



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

3 2044 078 474 111





**HARVARD LAW SCHOOL  
LIBRARY**







**Vol. 50—Mississippi Re-  
ports.**

50	1	50	278	50	521	50	677
52	308	51	798	53	278	53	653
		52	558	54	455	57	57
50	24	57	637	57	277		
63	77	58	476	59	323	50	688
						51	83
50	34	50	310	50	531	52	767
54	749	51	890	50	806	53	622
54	751	54	679			55	54
56	151	57	524	50	545	57	876
				51	352		
50	56	50	320	68	528	50	694
51	867	54	430			55	319
51	868	54	714	50	551	62	263
		65	210	53	146	64	452
		67	496	57	524		
50	68					50	717
51	762	50	336	50	556	52	787
54	406	53	330	51	109	69	69
63	538	57	774	66	334		
						50	722
50	81	50	344	50	561	50	438
64	4	52	91	50	559	53	583
64	5	59	212	50	652	54	487
		61	358	50	653		
50	86			52	535	50	735
52	701	50	363			51	28
		62	16	50	575	51	126
50	103			50	776	51	127
54	359	50	380	52	748	55	140
58	278	50	367			55	143
58	281	52	117	50	590	56	74
		54	43	64	174	56	120
50	117	57	524	69	286	56	123
56	575						
		50	386	50	601	50	776
50	127	51	530	51	190	54	55
55	574	60	211	56	527		
56	407	65	210			50	795
		67	496			55	104
50	130			50	607	55	108
54	641	50	396	51	32		
		52	433	51	41	50	802
50	147	52	660	51	42	58	815
65	48	55	378	51	120	64	364
				53	320	64	367
				54	412		
50	153	50	403				
58	717	51	334	50	628		
		54	100	67	725		
50	175						
52	168	50	429	50	631		
57	508	50	732	52	751		
				54	697		
50	178	50	468	54	699		
67	259	56	107				
				50	638		
50	194	50	498	51	404		
51	495	61	439	51	550		
54	69			51	672		
57	470	50	500	51	412		
		59	185	56	527		
50	238	59	250	61	550		
58	660	60	528				
		64	717	50	648		
50	251			52	272		
53	559	50	510	52	275		
		64	76	69	528		
50	269						
52	221	50	517	50	662		
		67	320	56	189		

Copyright, 1903, by Frank Shepard, Chi-  
cago. (Patent applied for.)









Jan 1

39

REPORTS OF CASES  
IN THE  
SUPREME COURT  
FOR THE  
STATE OF MISSISSIPPI.

VOL. I.

---

BY  
HARRIS & SIMRALL,  
REPORTERS TO THE SUPREME COURT.

---

VOL. 2.

CONTAINING CASES DETERMINED AT THE APRIL AND OCTOBER TERMS, 1874.

PUBLISHED BY AUTHORITY.

CHICAGO:  
CALLAGHAN AND COMPANY,  
LAW PUBLISHERS.  
1875.

Entered according to Act of Congress, in the year eighteen hundred and seventy-five,

By G. E. HARRIS AND G. H. SIMRALL,

in the office of the Librarian of Congress, at Washington, D. C.

*rec. July 24, 1876*

ATWOOD & CULVER, PRINTERS AND STEREOTYPERS.  
Madison, Wis.



JUDGES  
OF THE  
SUPREME COURT

DURING THE TIME OF THESE REPORTS.

---

EPHRAIM G. PEYTON, - - CHIEF JUSTICE.

HORATIO F. SIMRALL, }  
JONATHAN TARBELL, } - ASSOCIATE JUSTICES.

---

*Attorney General,* - - - G. E. HARRIS.

*Reporters,* - - - HARRIS & SIMRALL.

*Clerk,* - - - A. W. LITTLE.

# JUDGES AND DISTRICT ATTORNEYS

## OF THE SEVERAL

*Circuit Court Districts of the State of Mississippi, during the time of these Reports.*

Dists.	Judges.	District Attorneys.
1.	Hon. G. C. CHANDLER,	D. B. SEAL, Esq.
2.	Hon. JAMES M. SMILEY,	JOHN B. DEASON, Esq.
3.	Hon. A. ALDERSON,	E. H. STILES, Esq.
4.	Hon. W. H. HANCOCK,	S. H. TERRAL, Esq.
5.	Hon. URIAH MILLSAPS,	A. H. McLAUREN, Esq.
6.	Hon. ROBERT LEACHMAN,	T. H. WOOD, Esq.
7.	Hon. J. A. ORR,	H. B. WHITFIELD, Esq.
8.	Hon. W. D. BRADFORD,	C. B. MITCHELL, Esq.
9.	Hon. R. B. BOONE,	JOHN A. BLAIR, Esq.
10.	Hon. ORLANDO DAVIS,	J. F. FANT, Esq.
11.	Hon. C. C. SHAKLEFORD,	C. W. CLARK, Esq.
12.	Hon. E. S. FISHER,	M. C. BRADY, Esq.
13.	Hon. JASON NILES,	W. R. BARKSDALE, Esq.
14.	Hon. W. B. CUNNINGHAM,	D. B. PRATT, Esq.
15.	Hon. GEORGE F. BROWN,	LUKE LEA, Esq.

NOTE. — By an act of the legislature, approved April 1, 1873, the Third and Thirteenth Circuit Court Districts were abolished, and the counties of which they were composed added to the adjacent Districts — Judges ALDERSON and NILES having previously resigned.

## CHANCELLORS OF THE STATE OF MISSISSIPPI.

Dists.	Dists.
1. Hon. WM. G. HENDERSON.	11. Hon. DALLAS P. COFFEY.
2. Hon. G. S. McMILLAN.	12. Hon. J. J. HOOKER.*
3. Hon. WESLEY DRANE.	13. Hon. SAMUEL YOUNG.
4. Hon. THOMAS CHRISTIAN.	14. Hon. EDWIN HILL.
5. Hon. THEODRIC C. LYON.	15. Hon. E. STAFFORD.
6. Hon. O. H. WHITFIELD.	16. Hon. E. W. CABANISS.
7. Hon. AUSTIN POLLARD.	17. Hon. T. R. GOWAN.
8. Hon. A. E. REYNOLDS.	18. Hon. D. N. WALKER.†
9. Hon. DEWITT STEARNS.	19. Hon. J. M. ELLIS.
10. Hon. J. F. SIMMONS.	20. Hon. E. G. PEYTON, Jr.

\* Died September, 1873, and Hon. W. A. DRENNAN appointed October, 1873.

† Died October, 1873, and Hon. J. R. GALTNEY appointed October, 1873.

# TABLE OF CASES.

## A

African Bapt. Church, Trustees of, Warren v. . . . .	223
Alcorn, Swain v. . . . .	320
Allison, Surv'r, etc., Neal v. . . . .	175
Arbuckle v. Nelms, . . . . .	556

## B

Baker et al. v. Griffin, . . . . .	158
Baskin, Adm'x, Hargrove v. . . . .	194
Basas et al. v. Estill et al., . . . . .	300
Bay v. Shrader, . . . . .	326
Beauchamp, McDuff et al. v. . . . .	531
Beauchamp et al., Wilson, et al. v., . . . . .	24
Bedell v. State of Mississippi, . . . . .	492
Bernard et al. v. Elder et al., . . . . .	336
Betts v. Ratliff, . . . . .	561
Blackwood, Watson et al v. . . . .	15
Board of Education v. West Point, . . . . .	638
Bolton, O'Leary v. . . . .	173
Booth et al., Lanier v. . . . .	410
Boykin v. State of Mississippi, . . . . .	375
Brady, Dist.Att'y, ex rel.v. Howe, . . . . .	607
Brady, Dist. Att'y, ex rel. v. West, . . . . .	68
Brooks v. Snead, . . . . .	416
Brown et al. v. B'd of Levee Com'rs, . . . . .	463
Buck v. Paine & Raines, . . . . .	648
Burnham v. Sumner, . . . . .	517
Byrne et al. v. The State, . . . . .	688

## C

Carr et al., Patrick, Guardian, etc., v. . . . .	199
Carroll Co., Sup'rs of, Hawkins et al. v. . . . .	735
Cayce v. Stovall, . . . . .	396
Cachute v. The State., . . . .	165
Cock et al. v. Oakley et al, . . . . .	628
Comfort, Planters Ins. Co. v. . . . .	662
Cooper et al., Phillips et al v., . . . . .	723
Cox et al., Wilson v. . . . .	133
Crawford & Gaither, Prince v. . . . .	344
Crider et ux., Newell v. . . . .	539
Cummings et al. v. Oglesby, . . . . .	153
Curtis et al., Kimbrough v. . . . .	117

## D

Daniel v. Purvis, . . . . .	261
Davis et ux.v. Hamilton, Adm'x, . . . . .	213
Davis et al., Littlewort, Supt., v., . . . . .	403
Davis v. The State, . . . . .	86
Dent v. Jones et al., . . . . .	265
Dickman et al. v. Williams, . . . . .	500
Dobbins, Halfacre v. . . . .	766
Doniphan v. The State, . . . . .	54
Dunn, Moore et al. v. . . . .	32

## E

Edmonson & Winn v. Meacham, . . . . .	34
Education, State B'd of, West Point v. . . . .	638
Elder et al., Bernard et al. v. . . . .	336
Erwin v. Heath, . . . . .	796
Estill et al., Bass et al. v. . . . .	300
Everett, Smith v. . . . .	575

## F

Foster et al., Jones v. . . . .	47
Freeman, Kellogg v. . . . .	127

## G

Garland v. Garland, . . . . .	694
Garland v. Norman, . . . . .	238
Garrard v. The State, . . . . .	147
Gibbs, Hardee v. . . . .	802
Green et al., McLaughlin v. . . . .	453
Griffin, Baker et al. v. . . . .	153
Griswold v. Simmons et al., . . . . .	137
Griswold v. Simmons et ux., . . . . .	123

## H

Halfacre v. Dobbins, . . . . .	766
Hamilton, Adm'x, Davis et ux. v. . . . .	213
Hardee v. Gibbs, . . . . .	802
Hargrove v. Baskin, Adm'x, . . . . .	194
Harris, O'Leary v. . . . .	13
Harvey, Phillips et al. v. . . . .	489
Hawkins v. Carroll Co. . . . .	735
Heath, Erwin v. . . . .	795
Heiderhoff et al., Nicholson, Ex'x, v. . . . .	56
Hodges et al. v. Phillip et al., . . . . .	863
Hooper, Jones v. . . . .	510



Hopton v. Swan, - - -	545	Neely, Thomason et al. v., - -	310
Howd v. Miss. Cen. R. R. Co., -	178	Newell v. Crider et ux., - -	539
How, Brady, Dist. Att'y ex rel. v.	607	N. O., J. & G. N. R. R. Co.,	
Hudson, Turnipseed v. - - -	429	Thompson v., - - -	315
Hudson, M. & O. R. R. Co. v. -	572	N. O., J. & G. N. R. R. Co. v.	
Hume, Irion et al. v. - - -	419	Wallace, - - -	244
I		Nicholson, ex'x v. Heiderhoff et	
Irion et al. v. Hume, - - -	419	al., - - -	56
Irwin et al. v. Lewis, - - -	363	Norman, Garland v., - - -	238
Ivey v. White, - - -	142	O	
J		Oakley et al., Cock et al. v., -	628
Jones et al., Dent, v., - - -	265	Oglesby, Cummings et al. v., -	153
Jones v. Foster et al., - - -	47	O'Leary v. Bolton, - - -	172
Jones v. Hooper, - - -	510	O'Leary v. Harris, - - -	18
Jones et al., Palmer v., - - -	657	P	
K		Paine & Raines, Buck v., - -	648
Kaufman v. Whitney, - - -	103	Palmer v. Jones et al., - - -	657
Kellogg v. Freeman, - - -	127	Partee et ux. v. Stewart, - - -	717
Kimbrough v. Curtis et al., -	117	Patrick, Guardian, etc. v. Carr	
Kirkpatrick v. Miller et al., -	521	et al., - - -	199
L		Phillips et al. v. Cooper et al., -	723
Lanier v. Booth et al., - - -	410	Phillips et al., Hodges et al. v.,	362
Levee Com'rs, Brown et al. v., -	468	Phillips et al. v. Harvey, - - -	489
Lewis, Irwin et al. v., - - -	363	Planters' Ins. Co. v. Comfort, -	662
Littlewort, Sup't, v. Davis et al.,	403	Pollard v. Eckford, - - -	631
Logan v. The State, - - -	269	Prewett et al. v. Nash, - - -	584
Lord et al., Moore et al. v., -	229	Prince v. Crawford & Gaither, -	344
Lowenstein et al., Taylor v., -	278	Pulliam et al. v. Taylor, - - -	251
M		Pulliam v. Taylor, - - -	551
Martin v. Minor & Minor, - - -	42	Purvis, Daniel v. - - -	261
Marx v. Trussell, - - -	493	R	
McBeth v. The State, - - -	81	Ratliff, Betts v. - - -	561
McDuff et al. v. Beauchamp, -	531	Ross et al., Stewart et al. v. -	776
McLaughlin v. Green et al., -	453	S	
McLellan, Tatum, Adm'r v., - -	1	Scruggs, M. & C. R. R. Co., v. -	284
Meacham, Edmondson & Winn v.,	84	Shattuck v. Miller, - - -	386
M. E. Church v. Vicksburg, - -	601	Shaw et al. v. Millsaps et al., -	380
Miller et al., Kirkpatrick v., -	521	Shearer v. Shearer, Adm'x, et al.	113
Miller, Shattuck v., - - -	386	Shrader, Bay v. - - -	326
Millsaps et al., Shaw et al. v., -	380	Shryock & Rowland, Morris v.	590
Minor & Minor, Martin v., - - -	42	Shumate, White v. - - -	130
Miss. Cent. R. R. Co., Howd v.,	178	Simmons et ux., Griswold v. -	123
M. & O. R. R. Co. v. Hudson, -	572	Simmons et al., Griswold v. -	137
M. & C. R. R. Co. v. Scruggs, -	284	Smith v. Everett, - - -	575
Moore et al. v. Dunn, - - -	33	Snead, Brooks v. - - -	416
Moore et al. v. Lord et al., - -	229	Stafford et al., Wood v. - - -	370
Morris v. Shryock & Rowland,	590	State Board of Education v. West	
Moss, Usher v. - - -	208	Point, - - -	638
Musgrove, Auditor, etc. v. Vick.		State of Mississippi, Bedell v. -	492
& N. R. R. Co., - - -	677	State of Mississippi, Boykin v.	375
N		State, Byrne et al. v. - - -	688
Nash, Prewett et al. v., - - -	584	State, Cachute v. - - -	165
Neal v. Allison, Surv'r, etc., -	175	State, Davis v. - - -	86
		State, Doniphan v. - - -	54
		State, Garrard v. - - -	147

## TABLE OF CASES.

vii

State, Logan v. . . . .	269
State, McBeth v. . . . .	81
State of Mississippi, Stewart v. . . . .	587
State of Mississippi, Wright v. . . . .	833
Stewart et al. v. Ross et al., . . . . .	776
Stewart v. State of Mississippi, . . . . .	587
Stovall, Cayce v. . . . .	396
Sup'rs of Carroll Co., Hawkins et. al. v. . . . .	735
Sumner, Burnham v. . . . .	517
Swan v. Alcorn, . . . . .	320
Swan, Hopton v. . . . .	545

## T

Tatum, Adm'r, v. McLellan, . . . . .	1
Taylor v. Lowenstein et al., . . . . .	278
Taylor, Pulliam et al. v. . . . .	251
Taylor, Pulliam et al. v. . . . .	551
Thomason et al. v. Neeley, . . . . .	810
Thomson v. N. O., J. & G. N. R. R. Co., . . . . .	815
Thompson v. Toomer & Sykes, . . . . .	394
Toomer & Sykes, Thompson v. . . . .	394
Trussell, Marx v. . . . .	498
Trustees Af. Bap't. Church, War- ren v. . . . .	233
Turnipseed v. Hudson, . . . . .	429

## U

Usher v. Moss, . . . . .	208
--------------------------	-----

## V

Vicksburg, M. E. Church v. . . . .	601
Vick. & Nash. R. R. Co., Mus- grove, Auditor, etc., v. . . . .	677

## W

Wallace, N. O., J. & G. N. R. R. Co. v. . . . .	244
Warren v. Trustees Af. Bap't. Church, . . . . .	223
Watson et al. v. Blackwood, . . . . .	15
West, Brady, Dist. Att'y ex rel., v. . . . .	68
West Point, State B'd of Educa- tion v. . . . .	638
White, Ivey v. . . . .	142
White v. Shumate, . . . . .	180
Whitney, Kaufman v. . . . .	103
Wilson et al. v. Beauchamp et al., . . . . .	24
Wilson v. Cox et al., . . . . .	133
Williams, Dickman et al. v. . . . .	500
Wood v. Stafford et al. . . . .	370
Wright v. State of Mississippi, . . . . .	332

**REVISED RULES**  
**OF THE**  
**SUPREME COURT,**

**IN FORCE OCTOBER, 1874.**

---

**RULE 1.**

**TRANSCRIPT — WHEN FILED.**

In all cases brought to this court, by writ of error or appeal, the transcript of the record shall be filed in the clerk's office on or before the first day of the term, or time appointed for taking up the district, to which the case may belong ; and no transcript, not filed by that day, shall be received by the clerk unless ordered by the court, upon sufficient affidavit, showing good cause for such failure.

**RULE 2.**

**WHEN DOCKETED AND DISMISSED.**

In all cases when an appeal or writ of error is taken, if the plaintiff in error or appellant fail to file a copy of the record as required, the opposite party may have the same dismissed on presenting and filing a copy of the record, or a certificate of the clerk of the court below, under the seal of the court, showing that such writ of error or appeal has been taken.

## RULE 3.

## RECORDS AND PAPERS MARKED "FILED."

No record or other paper shall be considered as filed until so marked by the clerk — writs of error and citation excepted — and the clerk shall indorse the date of filing.

## RULE 4.

## TRANSCRIPTS — TO BE PLAINLY WRITTEN, BOUND AND PAGED.

Every transcript of a record brought to this court, shall be distinctly and plainly written on one side of every leaf and bound together at the top, and each page numbered in figures; and no transcript, not conforming to this rule, shall be filed by the clerk.

## RULE 5.

## AGREED TRANSCRIPT.

By agreement of parties or their attorneys, made in writing and attested by the clerk of the court in which any cause may be pending or record existing (which agreement shall be filed and made a part of the transcript of such record), such part of the record and proceedings as shall be so agreed, shall constitute the transcript of the record to be brought to this court; and shall be certified as such and be considered a full transcript in this court for the consideration and final adjudication of the cause here.

## RULE 6.

## SUGGESTION OF DIMINUTION.

If a record be imperfect, diminution may be suggested by either party and *certiorari* awarded; provided, it be done in the first week of the term, or within four days after the assignment of errors is filed.

## RULE 7.

### ASSIGNMENT OF ERRORS.

The plaintiff in error, or appellant, shall file a written statement of the grounds, or points of error, intended to be relied on, on a separate sheet of paper, before the call of the docket, on the first day of the term of the proper district, or at least four days before the case shall be called for hearing, or the case shall be dismissed; and no error, not so distinctly assigned, shall be argued by counsel or will be considered by the court.

This rule subject to the modification contained in rule 28.

## RULE 8.

### ABSTRACTS AND BRIEFS.

Before any cause will be taken upon submission, or heard, the counsel shall furnish the court with a full abstract of all the material matters involved in the consideration of the cause, as they appear in the record, printed, or written in a plain and legible hand; and the counsel on each side, shall also, at the time of the submission, file copies of their briefs, printed or written as aforesaid, containing the points and authorities relied on; and no case will be taken on submission, or considered by the court, unless the foregoing requisites be complied with.

## RULE 9.

### SUBMISSION.

No cause shall be submitted without argument unless by approbation of the court.

## RULE 10.

### ARGUMENT.

Not more than two counsel on the same side, nor a longer time than four hours will be allowed in argument in any case, unless

by special leave of the court. Where there are two counsel on the same side, they may arrange for the division of time between themselves, which arrangement will be respected by the court.

### RULE 11.

#### RE-ARGUMENT.

Applications for re-argument shall be presented in open court by petition, and noted on the minutes of the court on or before the Saturday succeeding the delivery of the opinion; and no re-argument shall be granted upon any point or question not distinctly made and insisted upon at the original hearing or submission of the cause.

### RULE 12.

#### PETITION FOR RE-ARGUMENT.

Petitions for re-argument must be signed by at least three members of the bar, who shall certify that they have carefully read and examined the record and the briefs of counsel, and have read the opinion of the court and the authorities cited, and are satisfied from such examination and investigation that such an opinion is erroneous.

### RULE 13.

#### AN ORDER FOR RE-ARGUMENT — CAUSE AT END OF DOCKET.

When a re-argument is ordered, the cause shall be placed at the end of the docket of its district and heard at the same term.

### RULE 14.

#### PAPERS OUT OF OFFICE.

When a cause is regularly called on the docket for hearing, if the transcript of the record be not in court, the counsel to whom it is charged by the clerk shall pay a fine of twenty-five dollars.

## RULE 15.

## MOTIONS.

Every Saturday shall be motion day; and if counsel be not present when their motions are regularly called, such motion shall be dismissed, and no motion once disposed of or dismissed shall be again heard.

## RULE 16.

## MOTIONS MUST BE DOCKETED, ETC.

No motion shall be heard unless it has been entered on the docket, and the reasons in support thereof filed, with the papers on at least a half sheet of paper one entire day before it is called.

## RULE 17.

## MOTIONS TO DISMISS — WHEN WAIVED.

When a motion is made to dismiss, and counsel for the motion either withdraws it or suffers it to be dismissed, for want of prosecution, it shall be considered a waiver of the defect on which the motion was predicated, unless it be so material that no judgment can be given.

## RULE 18.

## MOTIONS FOR NEW SECURITY.

When a defendant in error shall be dissatisfied with the security taken on a writ of error bond, he may move the court for a rule upon the plaintiff in error, to show cause on a day to be named, why the *supersedeas* should not be discharged or other security given; a copy of which rule shall be served on the plaintiff in error, at least five days before the said day.

The motion for the rule must be founded upon an affidavit of the insufficiency of the security taken; and the affidavit of a person interested in the judgment, below may be read in support of

the application. If the court is satisfied from the affidavit that there is cause to interpose, the rule will be entered. On showing cause, affidavits taken by either party may be read to show the sufficiency or insufficiency of the security taken; provided reasonable notice be given of the taking of the same.

The affidavit of the surety may be taken. If the security is adjudged insufficient, the additional security must be appointed by the court.

### RULE 19.

#### WHEN NO COUNSEL OR BRIEF, CAUSE TO BE DISMISSED.

When any case shall be called for trial in its order, if no counsel appear to answer it on either side, and no brief be filed on behalf of either of the parties, the cause shall be dismissed for want of prosecution.

### RULE 20.

#### HOW CAUSE REINSTATED.

No cause that has been dismissed shall be reinstated unless it be on affidavit setting forth probable error in the proceedings.

### RULE 21.

#### STATE CAUSES, TO BE DISMISSED.

Causes remaining on docket for more than three terms, without any steps taken to prepare them for hearing, shall be dismissed for want of prosecution, unless some good cause be shown to the contrary.

### RULE 22.

#### DOCKET TAKEN UP IN ITS ORDER — EXCEPT DELAY CAUSES.

At each term of the court, the docket shall be taken up in its order. But on regular motion day, by motion entered for that purpose, causes may be submitted on a suggestion that they were brought here for delay, and if the court be satisfied of the truth



of such suggestion, the court will take up such causes first; and make proper disposition of them.

### RULE 23.

#### PROCESS — HOW TESTED.

All process returnable to this court shall bear test in the name of the chief justice or presiding judge.

### RULE 24.

#### WHEN WRITS OF ERROR MAY ISSUE HERE.

When a plaintiff in error shall file a record duly certified, without a writ of error, or when a writ of error may have been set aside as defective, the court may order a new writ, and it shall not be necessary to send said writ of error to the clerk of the inferior court; but the said writ shall be made out and filed by the clerk of this court, with the said record, which record shall be taken and considered as a due return to said writ.

### RULE 25.

#### CALCULATIONS.

When a party relies on an excess in the calculation of interest or damages as a reason for reversing a judgment, a true calculation shall be presented to the court, in writing and figures, with a certificate by some counsellor not interested in that cause, that the calculation is correct; and no such error will be noticed unless so presented to the court.

### RULE 26.

#### AGREEMENT OF COUNSEL.

No agreement between counsel will be regarded unless reduced to writing, and signed and filed by them.

## RULE 27.

## AUTHORITY OF COUNSEL—WHEN REQUIRED.

On showing predicated upon affidavit, any counsel may be required to produce his authority, or show satisfactory evidence thereof, for prosecuting or defending any cause in this court; and on failing to produce such authority, or furnish such evidence, the cause may be dismissed.

## RULE 28.

IN STATE CAUSE — DOCKET TAKEN UP SECOND MONDAY OF TERM,  
AND ASSIGNMENT OF ERRORS TO BE FILED ON OR BY FIRST DAY  
OF THE TERM.

In all criminal cases, and in all cases in which the state shall be the party interested, the docket containing such cases shall be taken up on the second Monday of the term to which they belong, and regularly proceeded with in their order on the docket, without being set by order of the court, except for special reasons; and in all cases the assignment of error shall be filed on or before the first day of the term for taking up the docket of the district to which such cases belong.

## RULE 29.

## CORRECTION OF MISTAKES.

When the records in cases of appeal or writ of error are in the hands of the clerk in time, under the rules, for the appropriate term of the court, but by mistake the writ of error or appeal is made out to a wrong term, the clerk shall docket the cause, if the record be otherwise in conformity to the court, for the appropriate term, so that parties may move the court to correct the mistake, or otherwise dispose of the writ of error or appeal.

The following rule adopted by the court at the October term, 1874, to take effect at the April term, 1875, is inserted here.

*Ordered:* That the following be adopted as a rule of this court, to take effect with the commencement of the April term, 1875 viz:

### RULE 30.

The counsel for the plaintiff in error, or appellant, shall file with the clerk of the court, at least six days before the case is called for argument, a written or printed brief, exhibiting a statement of the points of law or facts to be discussed, and the authorities relied upon in support of each point.

The counsel for the defendant in error, or appellee, shall file with the clerk his brief with a like statement of the points made, and the authorities, three days before the call of the case for argument.

### AMENDMENTS.

BRIEFS must contain in the following order:

*First.* A concise statement of the questions involved and the manner in which they are raised.

*Second.* In connection with the argument of the points of fact or law discussed, a reference to the pages of the record, and the authorities cited in support of each.

*Third.* When the error assigned is the admission or rejection of evidence, the evidence or the substance admitted or rejected must be quoted or given.

*Fourth.* When the error alleged is the giving or refusing instructions to the jury, the instruction given, or refused, or the substance thereof, must be quoted or given.

CASES ARGUED AND DECIDED  
IN THE  
SUPREME COURT OF MISSISSIPPI.

---

APRIL TERM, 1874, AND OCTOBER TERM, 1874.

---

JAS. D. TATUM, Adm'r, v. SARAH L. McLELLAN.

1. **WILLS — FEE SIMPLE — WHAT WORDS NECESSARY TO CONSTITUTE.** — No technical words are necessary to devise a fee, but any words denoting an intention to pass the entire interest will suffice. 4 Kent's Com., 536. The court looks to the whole instrument to discover the intent, and although technical words may be used, their legal operation may be countervailed, if necessary to give effect to the clear intent. *Lasher v. Lasher*, 13 Barb., 106.
2. **SAME — ESTATE FOR LIFE WHEN CREATED.** — The general rule is, that a devise for life with power to dispose of the thing at death is but an estate for life, and it goes, if the devisee or legatee does not dispose of it, to the next of kin of the testator. But if given to one generally — with a general power to dispose of it at his death, then he takes it absolutely. *Jackson v. Robins*, 16 Johns., 537; *Rail et al. v. Dotson et al*, 14 Smed. & Mar., 176; *Dean v. Nunnally*, 86 Miss. Rep., 358.
3. **PURCHASE BY TRUSTEE — WHEN VOID.** — A trustee may deal with a *cestui que trust*, and may purchase his share in the fund. The *cestui que trust* may avoid the sale or he may by acquiescence confirm it. It is for him to say whether it shall stand or not. *Jackson v. Van Dalfsen*, 5 Johns., 46.
4. **DEVISES FOR CHARITABLE PURPOSES.** — Such devises are void under arts. 55 and 56, code of 1857, p. 302, and the heirs of the testator would take whatever was designed for the charity.

APPEAL from the Chancery Court of Monroe County. Hon.  
O. H. WHITFIELD, Chancellor.

---

Brief for appellant.

---

The opinion of the court contains a sufficient statement of the case.

*Houston & Reynolds*, for the appellant :

1. The court erred in rendering the decree in favor of James D. Tatum for one half of the property belonging to the estate of Harvey W. Allen, as the heir of his wife the widow of Harvey W. Allen, and a devisee under his will, and in decreeing that one half of the proceeds arising from the sale of such property, be paid to Tatum.

2. A power of sale attached to an express life estate will not have the effect to enlarge it into a fee. 36 Miss., 364. It is but an estate for life, and if the devisee does not dispose of it, it goes, when there is no devise, over to the heir or next of kin. But if it be given to one generally with general powers of disposition in the devisee, he is vested with a fee. *Jackson v. Robins*, 16 Johns., 537; 1 Sugden on Powers (126), 144, note 1; *Flintham's Appeal*, 1 Serg. & Rawle, 23, 24; *Donley v. Shields*, 14 Ohio, 362; *Edmondson v. Dyson*, 2 Kelly, 311, 312; *Rail v. Dotson*, 14 S. & M., 176; *Andrews v. Brumfield*, 32 Miss., 114; *Dean v. Nunnally*, 36 Miss., 364; 4 Kent, 535, 536.

3. A trustee, executor or assignee cannot buy up a debt or incumbrance to which the trust estate is liable for less than is actually due thereon, and make a profit to himself; but such purchase inures for the benefit of the trust estate, and the creditors, legatees or *cestui que trust* shall have all the advantage of such trust. *Perry on Trusts*, §§ 428, 431; *Wiswall v. Stewart*, 32 Ala., 135; *Gillett v. Gillett*, 9 Wis., 194; *McClanahan v. Henderson*, 2 A. K. Marsh., 389; *Green v. Winter*, 1 Johns. Ch., 36; *Quackenboss v. Leonard*, 9 Paige, 334; *Hawley v. Marcius*, 7 Johns. Ch., 187; *Joor v. Williams*, 38 Miss., 546; *Scott v. Freeland*, 7 S. & M., 409; 1 Lead. Cas. Eq., 55, 181; 8 Ves., 346.

An heir, as against his co-heirs and creditors cannot hold an incumbrance for more than he gave for it; and the same rule applies to a devisee. If one of several joint purchasers buy an in-

---

Brief for appellee.

---

cumbrance for less than its face, he shall hold it for his co-purchasers at the price he paid. *Perry on Trusts*, 431; *Long v. Cop-ton*, 1 Vern., 464; *Lancaster v. Evors*, 10 Beav., 154; *Davis v. Barrett*, 14 ib., 542; *Johnson v. Blackman*, 11 Conn., 342.

4. The court erred in admitting Tatum as a witness to establish a claim or defense against the estate of a deceased person. Code of 1871, § 758; *Haralson v. White*, 38 Miss., 178.

*J. M. Acker*, for appellee :

1. The will must be construed in such a manner that the whole will stand, if possible. All its different parts must be taken together, so that the intention of the testator may be ascertained; and the intention, when discovered, must be carried out. The rights conferred by the will are inconsistent with any other estate than that of absolute ownership. *Jackson v. Robins*, 16 Johns., 537. No technical words are necessary to carry a fee. "All my estate, real and personal, to be at her disposal," is sufficient. 12 Johns., 389; 2 Barb., 534. If an estate is given to a person generally or indefinitely with power of disposition, it vests a fee. 4 Kent, 535-536.

Upon the principle of equitable conversion, the court will consider a direction to convert one species of property into another for purposes valid in law, as tantamount to an actual conversion. 7 Paige, 534. Courts in dealing with the subject will consider it as that species of property into which it was directed to be converted. 5 Paige, 320; 24 Wend., 660; *Ford's Eq.*, 318. Where after the death of the wife the executor is directed to sell the property and apply the proceeds to the payment of certain legacies, it was held a bequest of money and not of the property. 46 Barb., 470; 8 Paige, 37, 104; 2 Barb. Ch., 506.

2. A trustee will not be permitted to manage the trust estate so as to obtain any profit or advantage to himself; but whatever profits are obtained will belong exclusively to the *cestui que trust*. 1 Story Eq. Jur., 322; 4 How. (U. S.), 552, et seq. A trustee is bound to take care of the trust property as he would his own;

---

Brief for appellee.

---

and as a bailee without reward, he is liable only for gross negligence. 2 Story Eq. Jur., 1269.

A trustee cannot purchase an incumbrance on the trust estate at a discount for his own benefit; but this rule does not apply to an executor who purchases a specific legacy from a legatee, unless the legatee who made the sale should complain and show that an unfair advantage had been taken. A trustee may purchase of the *cestui que trust* the trust estate, but such purchaser must be fair, and it may stand even against the attacks of the *cestui que trust*. 33 Miss., 163; 1 Lead. Cas. Eq., 125.

The doctrine that a purchase by a trustee is absolutely void as to the *cestui que trust*, applies only in those cases where a trustee is appointed to buy or sell property, and he buys and sells to or from himself. In such cases the purchase is always held void upon application of the *cestui que trust*. Adams Eq., 184. There is no positive rule that the trustee cannot deal with the *cestui que trust*; but in order to do so he must divest himself of all advantage which his character as trustee might confer, and must prove, if the transaction is impugned, that it was fair. Adams Eq., 184; 1 Lead. Cas. Eq., 135, 144, 146. If the *cestui que trust* acquiesce in the acts of the trustee, no other person can complain. He may also confirm the sale. 1 Lead. Cas. Eq., 144; 5 Johns., 43-48; 14 ib., 407, 415; 2 Cow., 196, 238; 4 ib., 719, 744; 4 Des., 652, 705; 1 McCord Ch., 383, 389.

Being tenant for life, Mrs. Allen was entitled to all the rents and profits of the estate, and was bound to account only for the principal. 12 Wend., 433; 1 Greenl. Real Prop., 103.

The equity of the *cestui que trust* is to have the option of setting aside the sale or holding the trustee to it. Jameson v. Hapgood, 7 Pick., 1; 10 ib., 79, 111. If he elects to confirm after full knowledge of facts, neither he nor his representatives nor strangers can object. Lessee of Lazarus v. Bryson, 3 Binn., 54-58; Harrison v. Brown, 5 Pick., 519-521; Moore v. Hilton, 12 Leigh, 1; 5 Gill & Johns., 377-399.

---

Opinion of the court.

---

SIMRALL, J., delivered the opinion of the court :

This litigation arises out of the construction of the will of H. W. Allen, deceased, and of the legal consequence of a purchase, made by James D. Tatum, administrator *cum testamento annexo* of said Allen, of certain legacies.

The clause of the will (the 4th) brought up for construction is in effect —

"After all my debts and funeral expenses shall have been paid, it is my will that the remainder of my estate be disposed of, in the manner following, viz : having no children, I give and bequeath unto my wife, Martha Ann E. Allen, all my estate of every kind and description not hereinafter disposed of. To have and to hold the same during her natural life, free from the control and management of any other person whatever. At her death, if she die without issue by me begotten, it is my wish and I so direct, that my entire estate, real and personal and mixed shall be sold. \* \* My wife shall have full power to dispose of one-half of my estate arising from said sale as aforesaid, in any manner and way she may see fit; and I further direct that my executors shall, out of the proceeds of said sale as aforesaid, give unto the children of my sister, Mrs. Franky H. Collest, \* \* who may then be living, ten thousand dollars each."

In a subsequent part of the will, the 9th clause, the testator directed that none of his property should be sold, unless necessary to pay debts, but that the corpus and increase should be kept together until the sale, as directed in the fourth clause.

It is alleged that Trotter, the original executor, paid off the debts, made a final settlement in 1860, and turned over the property to Mrs. Allen, the widow, who had a short time before that intermarried with James D. Tatum. In 1865, Mrs. Tatum, formerly Mrs. Allen, died, without issue, and without making any disposition by will, deed or otherwise, of the one-half or any part of the estate, as contemplated by the 4th clause of the testator's will. In 1865, Jas. D. Tatum, the appellee, qualified as adminis-



---

Opinion of the court.

---

trator D. B. N., with will annexed of the testator Allen, but had returned no inventory, made no settlements, but had continued in the enjoyment of the property, in the residue, consisting of a plantation, etc., ever since.

The first enquiry is, as to the extent of estate which Mrs. Allen, the widow, took under the will.

It was remarked by Chancellor KENT, 4 Comm., 534, margin, that adjudged cases become of less authority, and are of more hazardous application, in the interpretation of wills, than decisions upon any other branch of the law. This is so, because of the very large liberty allowed in devising estates, and because of the loose, rude and perplexed language often used; and because the court in every instance attempts to reach the intent of the testator. No technical words are necessary to devise a fee; but any words denoting an intention to pass the whole interest will suffice as a devise; "*of all my estate, all my interest, all my property, all I am worth, or own, all my right or title in all that I shall die possessed of,*" or other like expressions, will carry the entire fee, if such expressions are not controlled and limited by other words. 4 Kent Comm., 536, margin. The court looks to the whole instrument, to discover the intent, and hence, although technical words may be used, their legal operation may be counter-acted, if necessary to give effect to the clear intent. *Lasher v. Lasher*, 13 Barb., 106. If the context shows that the testator used a term in a sense other than its ordinary legal acceptance, such sense must prevail. *Robertson v. Johnston*, 24 Geo., 102.

A nice, but an easily discernable distinction is made in the cases, between words which carry a fee and those which convey a life estate. Thus, in *Bradford v. Street*, 16 Vesey, 138, the estate was given to devisee for life, who could dispose of it by deed, writing, or last will, the devisee took a fee. It was said that if the estate be for life, with unlimited power of appointing the inheritance, it comprehends everything. So in *Reid v. Shergold*, 10 Vesey, 378.

---

Opinion of the court.

---

In *Tomlinson v. Dighton*, 1 Salk, 239, the devise to the wife for life, and then to be at her disposal to any of her children who shall then be living, it was held that this was only an estate for life, and the disposing power was a distinct gift because the estate given is express and certain, and the power comes in by way of addition, and differs from the class of cases where the devise is to A. to sell, or to A. and that he shall sell, here the devisee is empowered to convey a fee, and is therefore construed to have one—he having no express estate derived from the power.

The distinction is made with great clearness by the judges in seriatim opinions, in *Flintham's Appeal*, 11 S. & R., 18, by Tighlman, C. J., by Gibson, J., p. 19, by Duncan, J., pp. 23 and 24, and by Kent, C. J., in *Jackson v. Robins*, 16 Johns., 587. If a bequest be of an estate a sum of money to a person to be disposed of at his death as he pleases, it rests in the devisee or legatee absolutely, though he make no disposition by will or otherwise. Gibson, J., said, "a power of disposition at death, engrafted on an express limitation for life, will not enlarge the interest of the legatee by implication." Duncan, J., said, "all the authorities agree, that a devise for life, with power to dispose of the thing at his death, is but an estate for life, and it goes, if the devisee or legatee does not dispose of it, to the next of kin of the testator, unless he has devised it over. But if given to one generally—with a general power to dispose at his death—then he takes it as property absolutely."

In *Jackson v. Robins*, supra, Chancellor Kent, after an exhaustive examination of the authorities, thus sums up: "We may lay it down as an incontrovertible rule, that where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life *only*—by certain and express words, and annexes to it a power of disposition." In this case the devise was all (testator's) real and

---

Opinion of the court.

---

personal estate to his wife, and in case of her death, without giving, etc., by will, or otherwise selling or assigning the said estate, then a devise to his daughter — held the devise over to be void as a remainder, or executory devise; and the wife took the whole estate.

In *Rail et al. v. Dotson et al.*, 14 S. & M., 183-4-5, the court affirms the rule, as expounded in this last case by an express reference to it — and also 1 Sug. Pow., 119. In that case the devise was “that said Mary Hume shall have the entire control and disposal of the land and negroes devised to her, for life, and at her death should be divided among her children, and should she die without children, then over to testator’s surviving children.” By codicil, Mrs. Amelia A. Calhoun was substituted trustee for Mary Hume in place of one Harding, and allowed the said Mary the management, possession, use, etc., of the property, to sell and exchange the same, and she shall have full power to dispose of the same by last will. After stating that power of “sale and exchange” meant nothing more than that the estate might be converted into other property of the same character to be settled to the same uses — the court declare, that it was “an estate in (Mary Hume) for life with power of sale and exchange or a power of disposition by will superadded. Such powers do not enlarge the life estate into a fee simple.

In the later case of *Dean v. Nunnally*, 36 Miss. Rep., 358, “the devise runs to the wife, to have and to hold and to sell any part of the estate that she might think best for her and her children’s interest, during her natural life or widowhood — held that the widow took a life estate in the property — or during widowhood, affirming the ruling in 14 S. & M., 184. In *Andrews v. Brumfield et al.*, 32 Miss., 109, the devise runs to the wife \* \* to have and to hold and enjoy during her natural life.” In a subsequent clause the property was directed to be delivered into her possession, as soon after testator’s death as possible — “that she may have full control of the same, and be empowered to dispose of the same as she may think proper.”

---

Opinion of the court.

---

After adverting to terms which have been held to create an absolute estate, the court add: If an express life estate had not been limited to Mrs. Andrews, there can be no doubt that a mere power would not have been conferred, but that she would have taken a fee \* \*. As it is, a mere power was given. For a power appended will not enlarge the life estate into a fee simple.

Returning to the will of H. W. Allen, and bringing the clause in question to the test of these authorities — and it appears that by apt and technical words, a life estate is expressly conferred upon Mrs. Allen, embracing the entire property, then follows the direction: “At her death, *if she die without issue by me begotten*, my entire estate, real, personal and mixed, shall be sold. My wife shall have full power to dispose of one-half of my estate, arising from said sale, in any way and manner she shall see fit,” \* \*, etc. Directions are then given to the executors, to pay from such proceeds summary legacies. The power of disposition, over half the proceeds of the sale is appended to the life estate — nor is the power absolute, for it is dependant on there being no issue begotten by the testator, living at the time of the wife's death. If there had been issue the reversion would have been to them, and the contingency would have occurred, depriving Mrs. Allen of the power.

Whenever the intention is apparent, it will be carried into effect, if it do not contravene some positive rule of law. 4 Kent Com., 318. Rail v. Dotson, 14 S. & M., 184. What is the manifest scheme of the testator, as respects the disposition of his estate?

Preparatory to the provision for his wife, the testator recites the fact that he “has no children;” after making a most ample provision for his wife, the thought occurs, that there was the probability or the possibility of issue coming into being, and he addresses himself to that contingency, and by implication says: if a child or children shall be alive at the death of his wife, then such child or children shall take the reversion under the law.

---

Opinion of the court.

---

But if at that time there be no issue of the marriage, my whole estate shall be converted into money, and my wife shall have power to bestow one-half of it, upon such objects of bounty as she may choose; and the executors shall, out of the other half, pay certain legatees the sums respectively named. The residue of the estate, not otherwise devised, is, by the 8th item, given to the quarterly meeting conference of the Aberdeen circuit, for the education of the children of superannuated preachers. Such was the intention of the testator, fairly deducible from the entire will — read and construed by those rules of interpretation commonly applied to any composition for the purpose of attaining the meaning of the author.

The courts have held, that a power of disposition superadded to a life estate, does not enlarge it into a fee simple, because such must have been the intention; else why, by express words, only confer a life estate — what effect is to be given to that limitation — other than the plain words import?

We are of opinion that under the fourth clause of the will, Mrs. Allen took a life interest in the whole estate, with power to appoint who should take and enjoy the half of the proceeds of a sale after her death. And that her surviving husband Tatum has no interest over such half, not being the dowee or appointee of his wife.

The second enquiry is, whether the appellee shall be permitted to hold the several legacies bought by him, with the same benefits as the legatees from whom he purchased, so that he may retain the respective amounts in full, or *pro rata* with other legatees, out of the assets; or whether he should only be allowed the amount advanced for the purchase, and interest thereon.

It would not be controverted that an executor or administrator is subject to all the responsibilities as respects creditors, and distributees and legatees, as is the strict trustee to the *cestui que trust*. They owe fidelity to those for whom they act. Their duty is expressed by Perry on Trusts, § 427. All the power and influ-

---

Opinion of the court.

---

ence which the provision of the trust fund gives must be used for the profit and advantage of the beneficial owners, and not for the personal gain of the trustee. "They cannot use the trust property, *nor their relation to it*, for their own personal advantage." But the failure of due fealty to duty is, that Tatum purchased several of the legacies. It is not exactly seen how the parties to this suit can complain of that. If the act were injurious or fraudulent, it is not seen how it falls upon the objectors. The testator intended to dispose of his entire estate. He supposed that he had done so by bestowing upon his wife a life estate, and a power to name an appointee or dowee for half of the fee, and the various legacies to be paid out of the property, and then instituting a residuary legatee. He doubtless supposed that his wife would exercise the power. In that view of it, if she did, then the other half would alone be responsible for the specific legacies; if she did not, the scope of the will is, that the specific legacies were to be paid out of the sale money, although more than half of it might be required. The mind of the testator was to pretermitt his heirs altogether. When the contingency arrived, upon which a sale was to be made, the entire estate must be turned into money, and the desire is clear, that its proceeds should pay off the specific legacies, and the residuum go to quarterly conference. The power not having been used, the whole estate became subject to specific legacies, if indeed so much were needed. The heirs of the testator would take whatever residuum was designed for the charity, after discharging specific legacies. Such bequests being void—code, 1857, arts. 55 and 56.

But whilst it is conceded that Tatum's purchase is voidable, and would be set aside at the suit of the legatees, who were sellers to him, how are the other parties affected or injured by those transactions? There is no doubt that the principle contended for applies, when the administrator brings in a debt or mortgage, for there are prior charges upon the estate to the claims of legatees. But if the administrator takes the assignment of the interest of

---

Opinion of the court.

---

a distributee at a price, much below its value, can that be said to be injurious to a codistributee, if the latter gets his distributive share?

Tatum could not buy in a debt or mortgage and hold it for its full amount against the legatees. But he could deal with a legatee for his claim, and whether he gave much or little, other legatees would not complain. But there are several difficulties in the way. A purchase by a trustee, of a part or the whole of the property, is not *per se* void, it is voidable or not, at the election of the *cestui que trust*. Tatum's purchase of these legacies might be set aside on the complaint of the legatees who sold. Because, if he has availed of his relation and superior advantages of knowledge to make an unconscionable bargain, that injury was inflicted upon the legatees with whom he dealt. It would be precisely like the case of an administrator who should buy the interest of a distributee; the codistributees are not interested in or affected by the amount paid, or the hardness of the bargain. Their claims on the distributive fund are not increased or diminished by such a transaction. It is a question exclusively between the administrator and the distributee.

It is not seen how the other legatees are prejudiced by Tatum's purchase. They should be paid in full, if the funds are sufficient, if not, there should be a proportional abatement. And, either in the former or latter case, it does not concern them whether the original legatees, or their assignee, are recipients of the money. A trustee may deal with a *cestui que trust*, and may purchase his share in the fund. The *cestui que trust* may avcid the sale, or he may, by acquiescence, confirm it. It is for him to say whether it shall stand or not. *Jackson v. Van Dalsen*, 5 John., 46, 47.

We think that the other legatees or their representatives, and others interested in the fund, cannot object to the purchase made by Tatum.

The principles which should guide in the final disposition of the controversy, lead to these results:

---

Brief for plaintiff.

---

1. The whole estate should be converted by sale into money which should be applied to the payment of the specific legacies, with interest, after twelve months from the death of Mrs. Tatum.

2. James D. Tatum, the purchaser and assignee of a portion of these legacies, as against the other legatees and the heirs and distributees of Allen deceased, the testator, should, in the apportionment of the money, stand on the footing of his assignors.

3. The heirs-at-law, succeeding to what was intended for the residuary legatees, the Quarterly Conference of the Aberdeen Circuit would be entitled to the residue of the money.

Decree reversed, and cause remanded.

---

P. O'LEARY v. JOHN L. HARRIS.

JURISDICTION OF SUPREME COURT IN APPEAL OR CERTIORARI FROM A JUSTICE OF THE PEACE.—The statute provides that in all cases of appeal from the judgment rendered in the court of a justice of the peace to the circuit court, when the amount in controversy exceeds the sum of fifty dollars, either party shall be entitled to a writ of error from the judgment of the circuit court, to the supreme court, as in cases originating in the circuit court. Rev. Code, 1871, § 1884. In cases originating before justices, it is the *amount* that gives jurisdiction to this court, and that amount must exceed fifty dollars. Appeals and writs of *certiorari* are only different modes of getting cases from the justice's court to the circuit court, and do not affect the question of jurisdiction.

ERROR to the Circuit Court of Hinds County. Hon. GEO. F. BROWN, Judge.

The opinion of the court and brief of counsel contain a sufficient statement of the case.

*Smith & Clifton*, for plaintiff in error, contended (1.) That the limitation of the right of appeal to cases where the amount in controversy exceeds the sum of fifty dollars, affects only such cases as have been carried to the circuit court from justices' courts by appeal, as



---

Opinion of the court.

---

provided in § 1332 of Code of 1871. That this limitation is further restricted to cases where the amount in controversy shall exceed the sum of twenty dollars, when such cases have been tried by a jury. (2.) That the legislature has recognized a distinction between writs of appeal and *certiorari*—1st. A writ of appeal must be prayed within five days after judgment is rendered; a writ of *certiorari* may be granted at any time within six months. 2d. Appeals must be tried anew, in a summary way; in *certiorari*, the court is confined to the examination of questions of law appearing on the face of the record.

Reporters find no brief in the record for defendant in error.

PEYTON, C. J., delivered the opinion of the court.

The record in this case shows that the defendant in error, on the 6th day of March, 1872, obtained a judgment against the plaintiff in error, in a court of a justice of the peace, for the sum of \$20.12 and costs of suit.

From this judgment of the justice of the peace, the cause was taken to the circuit court by writ of *certiorari*, and, on the 21st day of June, 1872, a judgment was rendered by said circuit court against the said P. O'Leary and P. J. Stone his surety in the supersedeas bond, for the said sum of twenty dollars and twelve cents with interest and costs; and from this judgment, the case is brought here by writ of error.

The first question presented by this record for our solution involves the jurisdiction of this court to entertain the writ of error.

The statute provides that in all cases of appeal from the judgment rendered in the court of a justice of the peace, to the circuit court, where the amount in controversy exceeds the sum of fifty dollars, either party shall be entitled to writ of error from the judgment of the circuit court, to the supreme court, as in cases originating in the circuit courts. Section 1334 of the Rev. Code of 1871.

It is insisted by counsel for the plaintiff in error, that this pro-

---

Syllabus.

---

vision of the statute is applicable only to cases of appeal from the justice's court to the circuit court, and not to cases brought to circuit court by the writ of *certiorari*.

In cases originating before justices, it is the *amount in controversy* which gives jurisdiction to this court, and that amount must exceed the sum of fifty dollars. Appeals and writs of *certiorari* are only different modes of getting cases from a court of a justice of the peace to the circuit court, and do not affect the question of jurisdiction which, as above stated, depends solely upon the amount in controversy.

In the case at bar, the amount in controversy being less than fifty dollars, this court has no jurisdiction of the cause, and the writ of error must, therefore, be dismissed.

---

## REBECCA WATSON et al. v. D. C. BLACKWOOD, Guardian, etc.

1. **WILLS—CONSTRUCTION THEREOF.**— Courts will look at the circumstances which surrounded the testator, and will through these means put themselves in his place, and then apply the terms of the instrument to its subject matter and objects. 2 Jaun. on Wills, p. 741. All parts of a will are to be construed in relation to each other, so as to form, if possible, a consistent whole. 16 Vesey, 814.
2. **SAME—SAME.**— Although there may be apparent inconsistency in several parts of a will, yet if there be clearly discerned a general intent, that should prevail and overrule the particular— although the latter be first expressed. The governing intent ought to control in the construction, if it can be made compatible with the import of the language used. Chase v. Lockerman, 10 Gill & John., 206.
3. **SAME—CASE IN JUDGMENT.**— The testator in his will directed that his son by a former marriage, who was not living with the family and received no benefit from the estate during the life of the widow—to whom all the property was loaned for life— should have a certain slave at a fixed price, and to share equally in the estate. *Held*, that the liens of such son should not be charged with the value of the slave before participating in the distribution of the estate.

---

Statement of case.

---

APPEAL from the Chancery Court of Panola County. Hon. B. F. SIMMONS, Chancellor.

The facts of the above stated cause are substantially as follows: Elisha M. Watson died in 1852, after having made a last will, leaving considerable real and personal property. By the second clause of his will (see page 3 of the transcript), said testator "loaned" to his wife, Mary Watson, "all his estate, both real and personal," except a slave named William, for and during her natural life or widowhood, with power to sell his lands if she desired to do so, provided the proceeds were considered a part of his estate, and subject to distribution with the testator's other property, as directed in the will. By the third clause of the will, the testator directed that in case his wife, Mary Watson, should marry, his "estate" should be divided, giving her for life "one-third of the whole estate," and the other two thirds to be equally divided between the testator's children, as follows: "My son Jesse I positively wish to have a negro man William, as a part of his portion of my estate, and that negro man I wish delivered to him at my death, by my executrix, for him to be priced to him by good judges at a fair valuation, as a portion of his interest in my estate, to him and his heirs forever; and the rest of my children as I hereafter name them, to be equal legatees with him in my estate, to-wit,"—then follow the names of seven of the testator's other children, not material to be given. (See pages 3 and 4 of transcript.)

Clause fourth directed that the children named above should receive a good English education out of the funds of the testator's estate, and should remain with their mother until they married or arrived at years of discretion. The seventh clause of the will is a substantial repetition of a portion of the third clause, above quoted. The eighth clause is as follows: "At the death of my wife, I wish my land sold and the proceeds arising therefrom equally divided between my children, Jesse Watson, and," naming the seven other "legatees" mentioned with Jesse in the third clause.

---

Brief for appellants.

---

Mary Watson, the widow, never married, but remained on the place until her death in 1872. Jesse Watson, as the proof shows, received the slave William upon the death of the testator, and owned and used him for several years — until the slave was accidentally killed. The witnesses prove the slave to have been worth \$800 or \$900, though he was inventoried at \$700. The inventory shows that all the slaves (including William) were worth about \$7,500, and that all of them, with the exception of William, were held by the widow, under the will, until emancipated. Jesse Watson died some time before the death of Mary Watson, the widow, leaving one heir, who is the ward of appellee. After the death of the widow, the land of the testator was sold and the shares of all the legatees paid over to them, except Jesse Watson's share (or rather that going to his minor child), which was paid into court, under decree of the court, and ordered held until further decree in the premises. The appellee, as guardian of the heir of Jesse Watson, petitioned the chancery court to have this share paid over to her, and the appellants (the remaining legatees in the case) resisted the petition until the value of the slave received by Jesse Watson should be added to the proceeds of the land, and his share of the aggregate amount ascertained, and the value of the slave received by him, under the will, *deducted* from such full share. Upon hearing, the chancery court refused to charge Jesse Watson, or his heir, with the value of slave, and ordered a full share of the proceeds of the land sale paid to appellee as guardian as aforesaid. From this decree the case comes to this court, and the appellants assign for error the action of the court in ordering the money paid to appellee without first deducting the value of the slave received by Jesse Watson in his life time.

*Cooper & Hall* and *R. H. Taylor*, for appellants, insisted :

1. That the construction given to the will by the chancery court was based upon a single clause of the will and upon isolated words. That such a construction is repugnant to the well settled

---

Brief for appellants.

---

rules bearing upon the construction of wills. 2 Jarm. on Wills, p. 742; Dean v. Nunnally, 36 Miss., 358.

2. That no part of a will can be rejected until every reasonable construction has been exhausted and it is certain that the different provisions of the will are irreconcilably repugnant. Sorsby v. Vance, 36 Miss., 564; 1 Redfield on Wills, p. 430, et seq.; Cox v. Britt, 22 Ark., 567; Walker v. Walker, 17 Ala., 396; Pace et ux v. Bonner, 27 Ala., 307; Miller et ux. v. Flournoy, 26 Ala., 724; Lutz v. Lutz, 2 Blackford, 72; Kelly v. Stinson, 8 Blackford, 387; Baker v. Riley, 16 Ind., 479.

3. That while a testator may discriminate between the objects of his bounty, the presumption is against any such discrimination, and the will must be construed so as to maintain equality, in the absence of a plain and clear manifestation to the contrary. Lassiter v. Wood, 63 N. C., 360; Wilcox v. Beecher, 27 Conn., 134; Lyon v. Acker, 33 Conn., 222; Smith's Appeal, 23 Penn., 9; Passmore's Appeal, 23 Penn., 381.

4. That the word "estate" in its ordinary sense means real as well as personal estate and when used in a will, it will carry realty as well as personalty. 2 Redfield on Wills, 308, et seq.; 17 Johns. (N. Y.), 281; Andrews v. Brumfield, 3 Geo., 117 and authorities there cited. And to restrict the word estate to personalty there should be a clear expression of intention to that effect. Same authorities. That in the will the testator used the word estate in referring to both his realty and personalty, and such being his intention must govern in the construction of the will.

5. That the general intent of the testator gathered from the whole will was to make all the devisees equally the objects of his bounty. That if Jesse Watson's estate was not chargeable with the value of a slave received by him from his father's estate immediately upon his death, as provided by the will, before he can share in the distribution of the fund arising from the sale of land of testator, the distribution would not be just or equal. For by casualties, death, etc., all the personal property was destroyed and

---

Opinion of the court.

---

none of the heirs but Jesse Watson received any benefit from the personalty.

*L. C. Balch* and *Walter & Scruggs*, for appellee, insisted :

1. That it is always competent to prove by parol the situation of the testator, the condition and character of the property, his surroundings and his relation to the subject with which he is dealing, so that the court can as near as may be realize the situation of the testator and thereby be better qualified to reach the meaning and instructions, through the language employed to express them. 43 Miss., 438, 454; 36 Miss., 564; 4 Kent's Com., p. 631.

2. That it was the intention of the testator that all of his children should share equally in his estate. That as Jesse living at a distance could not reap any benefit from the property "loaned" to the wife, which was to be used to maintain and educate the other children, the testator provided for him by directing the slave "William" to be delivered to him at the testator's death.

3. That equal justice could not be done and require Jesse to pay for the slave given to him and not require the other legatees to account for the personal property they took under the will. That all the personal property was worthless before the time arrived under the will for a general distribution of the estate, and to require Jesse to pay for "William" would be requiring him to account for what he received under a will bequeathing nothing.

SIMRALL, J., delivered the opinion of the court.

The single question litigated in this case is, whether the heir and distributee of Jesse Watson is entitled to share with the children of the testator, in the money raised by a sale of the land.

So much of the will as is necessary to be considered, in disposing of the subject, are extracted in "*hæc verba*" or substantially stated.

By the 2d item of the will, the testator gave to his widow, a

---

Opinion of the court.

---

life estate in the "whole of his property, including both real and personal (except a slave William), determinable however upon her marriage, coupled with a power to dispose of the land, the proceeds to constitute a part of his estate and subject to distribution as thereafter directed.

By the third clause, in the event of his widow's marriage, the testator directed his estate to be divided, so that the widow should have one-third for life, and the other two-thirds to be equally divided between his children (naming them), then follow these words: "My son Jesse Watson, I positively wish to have a negro man William, as a part of his portion of my estate, and that negro man I wish delivered to him at my death by my executrix, for him to be priced to him when delivered by good pages, at a fair valuation, as a portion of his interest in my estate; to him and his heirs forever, and the rest of my children, as named to be equal legatees in my estate with him."

The 8th item directs, at the death of his widow, "that the lands be sold, and the money arising therefrom to be equally divided between Jesse Watson, and other children, naming them."

By the documentary evidence and depositions, it is shown that the testator died in August, 1852, the owner of a tract of land, thirteen slaves, stock, etc. Jesse Watson, to whom the slave William was bequeathed, was a son by a first marriage, and was living near his father, but not a member of his family. He took the slave William into possession the first of the year 1853, and continued to control and claim him, for several years, and until the slave lost his life by a casualty.

The other children, as directed by the will, resided with their mother upon the farm, and were maintained out of the property.

Courts will look at the circumstances which surrounded the testator—will through these means put themselves in his place—and then apply the terms of the instrument to its subject matter and objects. 2 Jarm. on Wills, 741; *Brown v. Thorndike*, 15 Pick., 400; *Gilliam v. Chancellor & Murray*, 43 Miss. Rep., 453.

---

Opinion of the court.

---

All parts of the will are to be construed in relation to each other, so as to form, if possible, a consistent whole. If several parts are absolutely inconsistent and repugnant, the latter must prevail. 2 Jarm. on Wills, 741; 16 Vesey, 314.

Although there may be apparent inconsistency and incongruity in several parts, yet if there can be clearly discerned a general intent, that should prevail, and overrule the particular, although the former be first expressed. The governing intent ought to control in the construction, if it can be made compatible with the import of the language used. Chase v. Lockerman, 11 Gill & Johns., 206.

The widow died in 1872. Since her death the land has been sold as ordered by the will. The question in litigation is, whether the heir and distributee of Jesse Watson, deceased, represented by her guardian, should be charged with the value of the slave William, as so much received by her ancestor, before participating in the fund for distribution.

As we understand the record, if this grandchild is chargeable as claimed by the other beneficiaries of the will, nothing will be coming to her out of the fund.

The motive of making an immediate gift of the slave William to his son Jesse, referred to with emphasis in two distinct clauses, was because this son was living away from the family, and all of the residue of the property was left to the widow for life, or during widowhood, for the support of herself and the maintenance of her children, the half brothers and sisters of Jesse. Since he would derive no benefit from the general estate until the termination of the life or widowhood of Mrs. Watson, it seemed just to the father that so far as the personal property was concerned, he should at once be let into the enjoyment of what would approximate his share of it.

The governing intent to be gathered from the entire instrument must be adopted as the central idea, to give harmony and system to the testamentary plan. So that lesser particulars seemingly incongruous, must give way, if absolutely necessary.



---

Opinion of the court.

---

A prominent thought in the mind of the testator was to make his son by the first marriage, and his children by his last wife, equal participants in his property, so far as the necessities of his family would allow. The younger children were to be educated, and the widow provided for. Having but a small farm and but few slaves, these (with the exception of William) were to be kept together, by the widow, for that purpose. The power to sell the land, conferred by the second paragraph, was for the purpose of reinvestment, so that the proceeds of the land should constitute a part of his estate, and be subject to distribution as afterwards directed.

The third paragraph provided for the contingency of the widow's marriage, and directed in that event that the widow should have one-third for life, and the other two-thirds should go to his children, naming them; then follow the words: "My son, Jesse Watson, I positively wish to have a negro man, William, as part of my estate — \* \* to be delivered to him immediately after my death — \* \* at a fair valuation — \* \* as a portion of his interest in my estate. \* \* \* The rest of my children, as named, to be equal legatees in my estate with him."

The "estate" here referred to, means the personal, and does not include the real. The division enjoined, only embraces the personal property. The equality between the other legatees and Jesse, relates to that kind of property. This interpretation is strongly fortified by bringing into juxtaposition with it the paragraph immediately preceding and the 8th. The second item, after bestowing a life estate on the widow, gives her the power to sell, but charges the proceeds with a distribution, as afterwards directed. The power was evidently conferred that a reinvestment might be made in other lands. For the 8th paragraph directs a sale of the land at the death of the widow, and the money to be equally divided between Jesse and the children named.

The testator kept distinctly in his mind the two sorts of property which he was disposing of; the predominant purpose

---

Opinion of the court.

---

as respects both was, that in each kind, when the time for division came, Jesse and his half brothers and sisters should share equally. No provision was made for the sale of the slaves in any contingency. The design was that they should be divided on the second marriage of the widow, or at her death; but when it was made, it must be on the terms of equality between Jesse and the other legatees.

So the second paragraph foreshadows a distribution of the land fund, which is developed in the eighth item, whether the land which the testator left at his death, or other land into which the widow may have converted it; a sale should be made and the money equally divided between Jesse and half brothers and sisters.

The difficulty of settling the rights of the parties grows out of the altered condition of the testator's estate, by reason of the emancipation of the slaves.

We have discovered from an analysis of different parts of the instrument, the purpose, studiously kept prominent, of equality among the beneficiaries. That intent can be effectuated in consonance with the language used, by holding, that the gift of the slave to Jesse was to be accounted for when the division of the personal estate was to have been made. It was observed in *Lassiter v. Wood*, 63 N. C. Rep., 363, that the general intent must be carried out, "and minor considerations when they come in the way must yield, especially so when the purpose is in consonance with reason and natural affection." In that case the bulk of the landed property was given to the sons in separate parcels, estimated to be worth to each \$10,000. To his four daughters the testator gave pecuniary legacies of \$10,000 each. Because of the emancipation of the slaves, the personal estate fell far short of paying the legacies. The general purpose deduced from the will was, that the testator intended to make equal provision for all his children. To give effect to that intent, the court resolved that the pecuniary legacies should be charged upon the

---

Syllabus.

---

lands devised to the sons, so far as to produce equality among the children.

The governing motive with the testator, Joshua Watson, was, that the children of both marriages should share alike in the division of the slaves, and also in the distribution of the land fund. Emancipation has annihilated the former property, and there can be no adjustment of interests as respects it, such as was contemplated by the testator.

But equality will be observed and justice will be done by giving to the minor child of Jesse Watson, deceased, an equal share, with the other beneficiaries of the money arising from the sale of the land. Such was the decree of the chancellor, and it is affirmed.

---

ROBERT H. WILSON et al. v. MARY BEAUCHAMP et al.

1. HUSBAND AND WIFE—PURCHASE OF LAND—ADVANCEMENT.—Where the husband purchases land with his own money, and has the deed made to his wife, if she acquires any right in the land, it is by way of advancement, and this will depend upon the intention of the parties at the time of the transaction. The question of advancement under such circumstance, though presumed in the first instance, is a question of pure intention, and, therefore, any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption; and any acts or facts, so immediately after the purchase, as to be fairly considered a part of the transaction, may be received for the same purpose; and this presumption is stronger in favor of a wife than a child, for the reason that she cannot, at law, be trustee of her husband.
2. SAME—PROOF OF HANDWRITING.—Experts are allowed to testify whether the signature in dispute is by the same hand as another admitted to be genuine. And while comparison of handwriting by the jury is restricted in the English practice to writings put into the case for other purposes, it is allowed in the American states to put in the genuine signatures written before the controversy arose, for the mere purpose of enabling the jury to judge by comparison.

---

Brief for appellants.

---

3. **SAME—SAME—CONFLICT OF TESTIMONY.**—Where there is a conflict in the evidence in case depending on facts, where no legal questions are involved, as in the case under consideration, and where the mind cannot repose with entire confidence and certainty upon a conclusion in favor of either party, the action of the court below will not be disturbed.

**APPEAL** from the Chancery Court of Yalobusha County. Hon. WILLIAM KELLOGG, Judge, presiding.

The facts in this case are sufficiently stated in the opinion of the court.

The following are the assignments of error :

1. The said original and amended bills disclose no case entitling the complainants to relief.

2. The facts as established by the exhibits and evidence are not sufficient to entitle the complainants to recover.

3. The evidence as a whole does not sustain the allegation of the original and amended bills.

4. And for other reasons the appellees say that the said decree ought to be reversed and the bill dismissed.

*Harris & George*, for appellants :

Reviewed the evidence, and insisted that it was amply sufficient to sustain the decree. If the instrument creating or acknowledgment was a forgery, it was a forgery committed by Archibald Wilson. All the witnesses agree that the body of the instrument is in his handwriting. The dispute is only as to the signature of Nancy Wilson. It is impossible to believe that A. Wilson committed the forgery. There was no motive for it, for Mrs. Wilson acknowledges in her deposition that she would have signed it if requested to do so by A. Wilson, and hence a forgery is unnecessary.

Again, there are two witnesses who think that the signature to it is Mrs. Wilson's. She does not deny it positively. She would not recognize it. She admitted that she might have signed such a paper.

The testimony of the experts amount to nothing—and they

---

Brief for appellees.

---

differ. The opinions of those who are self-sufficient enough to speak with positiveness about matters of this sort ought not to weigh against the strong probabilities of the case. Besides, the land was held for twenty-five years, just as it would have been if Mrs. Wilson were a trustee. A. Wilson acted as owner, not merely as husband. He assessed the land in his own name, paid the taxes, and sold and conveyed it in his own name.

*E. S. Fisher*, for appellees:

The statute law of the state since the code of 1822, has been uniform, that the wife could only convey her land by the joint deed of herself and husband. At common law her deed alone was absolutely void. If then, the husband and wife must both be *vendors*, how could the husband become *vendee* in the same deed? It was a trust which could not be executed by the voluntary act of the husband and wife. Suppose the husband and wife by joint deed had conveyed to the husband, the deed would have been void. The wife cannot be the husband's trustee, for the very best of reasons, that she cannot execute the trust.

I insist that there is no case made by the evidence, and the court will hold that the trust must be clearly established.

To ascertain what is incumbent upon the complainants, let us quote from the answer of Nancy Wilson. It proceeds: But this respondent *positively and emphatically denies that her husband, Archibald Wilson, furnished the money to pay for the said land*. She says she furnished the money, and received the deed in her own name, with the sanction of her husband.

The answer next sets up that the husband was security for his brother, and that he abandoned the Reed purchase, fearing that he would have the debt to pay.

The first witness is Mary Beauchamp, complainant, and daughter of Archibald and Nancy Wilson, proves that in 1844 she was acquainted with the handwriting of Archibald and Nancy Wilson, that the body of "Exhibit A" is in Archibald Wilson's hand, and that the signature is Nancy Wilson's hand-writing, that

---

Opinion of the court.

---

she saw this paper in July, 1870, among her husband's papers and recognized the writing of her father and mother. Heard Nancy Wilson say that Archibald Wilson furnished the money to pay for the land.

Nancy Wilson says she never signed or delivered the deed.

Mrs. Martha Crawford says she heard Mrs. Wilson say it was Archibald Wilson's money, for which he sold his cotton, and that he gave it to her to buy the land, that she said when the paper was found, *she had no more knowledge of it than the dead.*

W. T. Beauchamp, Mary's husband, says "Exhibit A" was found in 1870 among some old papers of John Lott's, who could give no account of it.

This is all of complainant's case, except that she said she might have signed it.

Townsend, a good judge of writing, is clear in condemning the writing.

The proof fails to make up the case. The writing is not proved when we admit the signature. It was found among John Lott's old papers. How did it get there; he is not examined, and what he said to Beauchamp is not evidence, but even if it was, he said he knew nothing of the writing; he did not receive it as an escrow to hold for the parties. It is therefore an unestablished writing. It was more likely forged and dropped in among John Lott's old papers. If it had been a fair transaction, Lott's evidence would not have been omitted. Lott speaks of a verbal understanding of the same purport of the writing. If Lott, in July, 1870, could remember a verbal understanding had in 1844, he would have been equally likely to remember a writing between the parties handed to him at the same time. But nothing Lott said is evidence.

PRYTON, J., delivered the opinion of the court:

Mary Beauchamp and W. T. Beauchamp, her husband, Ellen Heath and Henry Heath, her husband, Mary E. Wilson, Henry E. Wilson, and James A. Wilson, filed their bill in the chancery

---

Opinion of the court.

---

court of Yalobusha county against Nancy Wilson, Robert Wilson, Thomas H. Wilson, Annie Davidson, Rebecca Doak and J. S. Doak, her husband, alleging that in the year 1844, Archibald Wilson, since deceased, purchased from one John Reed a certain tract of land situated near the town of Grenada in said county, containing about 480 acres, as described and set out in the bill. The bill further states that the said Archibald Wilson paid two thousand dollars for the land, and had the title to the same made to his wife, Nancy Wilson, who has since made voluntary conveyances of said land in different parcels, to several of her children, who are codefendants to this suit, and prays that the said Nancy Wilson be declared a trustee for the said Archibald Wilson, and that the voluntary conveyances made by her as aforesaid be annulled, and that the legal title to said land may be conveyed to the heirs of the said Archibald Wilson.

The complainants filed an amended bill, setting up an agreement in writing by said Nancy Wilson, of date June 20, 1844, admitting that her husband, A. Wilson, had bought the land in controversy, which she promised to hold in good faith for his benefit.

Nancy Wilson denies in her answer to the bill that her said husband furnished the money to buy said land, and avers that the same was purchased with her money, and she also denies having signed the agreement of the 20th June, 1844, to hold said land in good faith for her said husband, as set out in complainants' amended bill. And the answer of Robert Wilson corroborates to some extent the answer of Nancy Wilson.

Upon the final hearing of the case on original and amended bill, answers, exhibits and proofs, the court declared Nancy Wilson to be a trustee of the lands mentioned in the bill of complaint, for the heirs of Archibald Wilson, deceased, and decreed that the voluntary conveyances of the several parcels of said land made by said Nancy Wilson since the death of her husband, be

---

Opinion of the court.

---

set aside and annulled, and that said land be conveyed to the heirs of Archibald Wilson, deceased.

From this decree the defendants appeal to this court, and assign for error the action of the court below.

It is insisted, as stated in her answer to the bill, that Nancy Wilson bought the land herself, with her own money. This view of the case is not sustained by the testimony. And if she acquired a right to the land, it must be by way of advancement upon purchase of the same by her husband in her name. This will depend upon the intention of the parties at the time of the transaction; for it seems to be well settled by the authorities, that whether a purchase by the husband in the name of his wife is an advancement or not, is a question of pure intention, though presumed in the first instance to be an advancement and provision for her, therefore, any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption, and any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction, may be received for the same purpose. Perry on Trusts, 119, sec. 147. This presumption is stronger in favor of a wife, than a child; for the reason that she cannot, at law, be the trustee of her husband. 2 Story's Equity, 450, sec. 1204. And it is believed that the parol testimony in this case is insufficient to rebut this presumption. There is, therefore, no *implied* trust in the property for the heirs of Archibald Wilson, deceased.

Has the instrument of writing purporting to be an *express* trust, which is in the words and figures following, "June the 20th, 1844. This is to show that my *husban*, A. Wilson, has bought of John Reed, a *track* of land of 4 hundred and eighty acres *lighing* in Yalowbusha county, near Grenada, and has the deed made to me which I promise to hold in good faith for his benefit, (signed) NANCY WILSON," been established by the testimony?

Mary Beauchamp, testifies that she was acquainted with the handwriting of Nancy Wilson, and also with that of Archibald Wil-



---

Opinion of the court.

---

son, having frequently seen them write; that the body of the instrument above stated as Exhibit A., to the amended bill of complaint, is in the handwriting of Archibald Wilson, and the signature thereto is in the handwriting of Nancy Wilson. Saw it in July or August, 1870, among the papers of her husband, and knew at once it was the handwriting of my father, and my mother's signature, in her handwriting. Heard her mother say several times pending this suit, that she may have signed the instrument, but she had no recollection of it. Heard her often say that it was Archibald Wilson's money that paid for the land. And it is agreed by the parties, that Henry B. Heath and Miss Tennie Jones would both testify, that since the commencement of this suit, they have heard Nancy Wilson say she might have signed said instrument of writing, but if she did she had no recollection of it.

Richard P. Lake, testifies, that considering the dates, he regards the signatures of Nancy Wilson to the deed to William F. Beauchamp, dated 26th of December, 1856, and also the like signature to deed to Rebecca Doak, dated 23d of March, 1868, both admitted to be genuine, and the like signature to said instrument, to be written by the same hand. And that the signatures of Nancy Wilson to her bond to John Reed, dated the 11th day of June, 1844, when the purchase of the land was made, and to her deed to Alfred Brown, dated 17th day of February, 1845, and of her name to said instrument, were in his opinion, the same handwriting, and written by the same person. And W. F. Beauchamp, testifies, to having heard Nancy Wilson say, that she might have signed said instrument, but if she did she had forgotten it.

Nancy Wilson denies having signed said instrument, but said she would have signed it if her husband had offered it, knowing what it was for. And Martha A. Crawford testified that she heard her grandmother, Nancy Wilson, say that the money paid for the land in controversy, was the money of her grandfather Archibald Wilson, which he had received for his place in Noxubee county, and for his cotton crop.

---

Opinion of the court.

---

T. J. N. Bridgers and K. Coffman say, from comparison of handwriting, they do not believe that Nancy Wilson signed said instrument, and Ann E. Davidson is of the same opinion. And James B. Townsend testifies that he has no confidence in the ability of any one to tell whether a number of signatures or names were written by the same hand, where there is no more seen of the handwriting than the mere names, and where there had been no previous acquaintance with the hands before seeing the names.

The testimony of Mary Beauchamp proves the signature of Nancy Wilson to said instrument to be genuine; and that of Luke proves the signature to said instrument to be in the same handwriting with the signatures of Nancy Wilson to the deeds to William F. Beauchamp and Rebecca Doak, which are admitted to be genuine. This testimony, taken in connection with the admissions of Nancy Wilson that she might have signed it and forgotten it, and that she would have signed it if her husband had offered it, *knowing what it was for*, tends strongly to show that she signed the instrument, and, from lapse of time, had forgotten it; and this presumption is strengthened by the admission that she knew what it was for, and therefore would have signed it if her husband had offered it for her signature. From this, it is evident that there was an understanding between her husband and herself as to the instrument, and that she should execute it; and the instrument having been, as appears from the evidence, written by him, who must have known the importance of such a written declaration of trust, as evidence of the character in which she held the legal title to the land in dispute, it is not to be presumed that he would, after writing it, have neglected to offer it to her for her signature, according to their apparent understanding, whilst the whole transaction was fresh in their memory. This would be the course of a prudent man who desired to secure his right and protect his interests.

On the other hand, we have the testimony of T. J. N. Bridgers

---

Syllabus.

---

and K. Codman, who say, from comparison of handwriting, they do not believe that Nancy Wilson signed said instrument; and Ann E. Davidson was of the same opinion. James B. Townsend testifies that he has no confidence in the ability of any one to tell whether a number of signatures or names were written by the same hand, when there is no more seen of the handwriting than the mere names, and where there had been no previous acquaintance with the handwriting before seeing the names. But experts are allowed to testify whether the signature in dispute is by the same hand as another admitted to be genuine. And while comparison of handwriting by the jury is restricted in the English practice to writings put in the case for other purposes, it is allowed in the American states to put in genuine signatures, written before the controversy arose, for the mere purpose of enabling the jury to judge by comparison. But in a note to 1 Greenleaf's Evid., 621, sec. 576, it is said: "Those having much experience in the trial of questions depending upon the genuineness of handwriting, will not require to be reminded that there is nothing in the whole range of the law of evidence more unreliable, or where courts and juries are more liable to be imposed upon."

Where there is a conflict in the evidence in a case depending on facts, where no legal questions are involved as in the case under consideration, and where the mind cannot repose with entire confidence and certainty upon a conclusion in favor of either party, the action of the court below will not be disturbed.

The decree is affirmed.

---

J. V. MOORE et al. v. E. W. D. DUNN.

**JUSTICE OF THE PEACE — COUNTY COURT LAW.**—The act of the legislature of July 11, 1870, abolishing the county courts, provides that all suits then pending in said county courts, when the principal of the amount in controversy does not exceed \$150, shall be transferred to any justice's court

---

Opinion of the court.

---

at the county seat of the county in which such suit is pending. Where suit was brought in the county court, and transferred to a justice's court at the county seat, which court gave judgment for plaintiff, who appealed to the circuit court. It was error in the circuit court to dismiss the case for want of jurisdiction in the justice's court.

ERROR to the Circuit Court of Chickasaw County. Hon. W. D. BRADFORD, Judge.

This was a suit by attachment brought by defendant in error against the plaintiff in error in the county court of Chickasaw county, at the March term 1869, thereof. The suit was pending in July, 1870, when the county court was abolished. The case was transferred to a justice's court at the county seat, which court rendered a judgment for the plaintiff.

The defendant took an appeal to the circuit court, and there the plaintiff moved the court to dismiss the appeal for the want of jurisdiction in the justice's court, which motion was sustained and the case comes to this court upon a writ of error.

The following is assigned for error:

"The circuit court erred in sustaining the motion of plaintiff below to dismiss the appeal from the justice's court."

*Tucker, Harper & Buchanan* and *A. G. Shannon*, for plaintiff in error.

*Carlisle & Carlisle*, for defendants in error.

PRYTON, C. J., delivered the opinion of the court.

In this case, it appears that on the 7th day of January, 1869, E. W. D. Dunn sued out an attachment for \$58.60, returnable in to the county court for the 2d district of Chickasaw county, where in it was pending when the county courts were abolished by an act of the legislature, approved July 11, 1870. By the 3d section of which it is provided, that all cases then pending in said county courts, where the principal of the amount in controversy does not exceed \$150, shall be transferred to any justice's court at the county seat of the county in which such suit is pending. Laws of Miss., 1870, page 83.

---

Syllabus.

---

This suit was transferred to a justice's court at the county seat, which was in the 1st district of said county, and that court rendered judgment for the plaintiff against the defendants, who appealed to the circuit court of said first district, and the appeal was dismissed by said circuit court for want of jurisdiction.

The appeal was properly taken to the circuit court of the district in which the justice of the peace rendered judgment. The court, therefore, erred in dismissing the appeal.

The judgment must be reversed, and the cause remanded.

---

EDMONSON & WINN v. M. B. MEACHAM.

1. CONVEYANCES — STATUTE OF FRAUDS.— Purchases with the debtors money in the name of a third person, are not embraced in terms by the statute of frauds. *Gowing v. Rich*, 1 Ired., 553. The statute only operates upon conveyances made by the fraudulent debtor. *Lamplugh v. Lamplugh*, 1 Pr. Will, 111.
2. SAME — RULE AT COMMON LAW.— It is a maxim in the common law that fraud vitiates every transaction that it taints. Essentially the same principles exist at common law as are declared by the statutes. The fundamental principle is, that the insolvent debtor cannot purchase property for his wife and children so that they may hold it in defiance of his creditors. Such purchases of land, though not within the letter and terms of the statute of frauds, are nevertheless condemned by the common law, and the creditor may pursue the debtor's fund into the property and subject that.
3. SAME — ADVANCES BY HUSBAND — WHEN VALID.— A debtor may innocently subtract from his resources such means as may be reasonably necessary for the support of his family and the education of his children, which his creditor could not pursue.
4. SAME — HOMESTEAD EXEMPTION.— A fraudulent conveyance does not defeat the homestead. *Wood v. Chambers*, 20 Texas, 247. The title of the exemptionist is dependent on the facts "of his being the head of a family and residing upon the premises." When the occupancy ceases, the right to exemption is lost, and the property is liable to seizure and sale by judgment creditors or by attachment. *Lessly v. Phipps*, 49 Miss., 790.

---

Statement of case.

---

APPEAL from the Chancery Court of De Soto County. Hon. J. F. SIMMONDS, Chancellor.

Edmondson and Wynn filed their bill in the chancery court of De Soto county, alleging that at the August term, 1867, of the circuit court of De Soto county, they obtained a judgment against H. B. Meacham, for the sum of \$1,066 and costs, that a *fi. fa.* was issued upon said judgment, directed to the sheriff of De Soto county, and returned by him *nulla bona*. That on the 9th day of April, 1866, Meacham had purchased and paid for out of his own means, from one Fitzgerald, a valuable tract of land in De Soto county, containing 400 acres. That Meacham took the deed to the tract of land from Fitzgerald to his wife and children. That Meacham held said deed and did not permit the same to go to record until just before complainants obtained the judgment. That at the time the deed was made to the land by Fitzgerald, to the wife and children of Meacham, Meacham was insolvent, and the deed was made to hinder, delay and defraud creditors, and that complainant was a creditor at the time the deed was made, and the same was void as to complainants.

At the August term, 1858, of the chancery court, a decree was pronounced by the chancellor, declaring that the deed conveying the land from Fitzgerald to Mrs. Meacham and children, was made for the purpose of hindering, delaying and defrauding the creditors of H. B. Meacham, and especially complainants, and was void as to them; and the decree directed the clerk, as the commissioner of the court, to expose said land at public sale, and sell the same to pay complainants' judgment. Said commissioner, after advertising the land, sold the same on the 1st day of February, 1869, and one Wicks became the purchaser, for the sum of \$3,201. A decree was pronounced confirming said sale, and appropriating the funds; but on application of Fleming, Litus and other creditors, who had also filed bills against Meacham, claiming a priority in said fund, the decree was vacated, and the bills of all the creditors against Meacham were consolidated.

---

Brief for appellants.

---

On the 6th of February, 1872, Meacham filed his application in writing, stating that he was the head of a family, and that he resided upon the land with his wife and children, and resided thereon from the date of said deed until January, 1871, when he was put out of possession of the land by Wicks, the purchaser at the sale; and claimed that he was entitled to \$1,500 of the purchase money of the land, as his homestead exemption, and asks the court to direct that the same be paid to him.

The proof shows that Meacham, with his family, was residing upon the land, as their home, at the time the land was sold by the commissioner.

The proof further shows that at the time the conveyance was made by Fitzgerald to the wife and children of Meacham, that Meacham was the owner of a house and lot in Senatobia, and also the owner of another quarter section of land in De Soto county, Miss. That after the date of the deed from Fitzgerald of the land to his wife and children, Meacham conveyed said quarter section, and house and lot, in trust, and the same was sold after the sale of the Fitzgerald land by the commissioner.

The court pronounced a decree giving to Meacham \$1,500 as his homestead exemption, out of the proceeds of the sale of the land made by the commissioner under a former decree of the court, to pay the debts referred to in said decree, which is the decree complained of and appealed from.

*Sam. Powell*, for appellants, contended :

1. That the homestead exemption law is to give to the head of a family certain property exempt from execution, as a means of support for his family. That it does not give to a party property to which he has neither a legal or equitable right.

2. That a conveyance made to defraud creditors by the express terms of the statute is void only as to creditors, but is good and binding between the parties, their heirs and representatives. *Winn v. Barnett*, 30 Miss., 653.

3. That a debtor who has made a fraudulent conveyance to de-

---

Opinion of the court.

---

feat or delay his creditors cannot enforce against his confederates any stipulation for his benefit, or recover back according to their agreement any property which the debtor has thus gotten. The court will not interfere in his behalf. *Watt v. Congor*, 13 S. & M., 412.

*Walter & Scruggs*, for appellee, contended :

1. That as to the exempt property, the debtor is considered to be without creditors, and he may dispose of it as though there were no creditors, and cited *Smith v. Allen*, 39 Miss., 469; *Whitley v. Stevenson*, 38 Miss., 115; *Hardin v. Osborne*, 43 Miss., 536. The right to enjoy the benefit of the exemption does not in any manner depend upon the question as to the solvency or insolvency of the party, or whether he has made a fraudulent transfer of other property to hinder or delay his creditors. *Sears v. Hanks*, 14 Ohio St., 298; *Murphy v. Crouch*, 24 Wis., 365; *Crane v. Waggoner*, 33 Ind., 83; *Shaw v. Davis*, 55 Barb., 389; *Castle v. Parmer*, 6 Allen, 401. That a husband may sell and convey the homestead and thus enable him to procure another, yet he cannot waive it in favor of a judgment creditor. *Denny v. White*, 2 Cold., 284, and permit a levy and sale of the property by execution. *Ally v. Bay*, 9 Iowa, 509, and if waived and sold, the wife can recover from the purchaser. *Welch v. Rice*, 31 Texas, 688; *Quertier v. Hille*, 21 La. (Ann.), 429; *Swan v. Stephens*, 99 Mass., 7; *Hoskins v. Litchfield*, 31 Ills., 137.

2. That it was the duty of a court of equity to protect a husband in his exemption. If he failed to save his exemption out of the property, then the court should do so out of the sale money. *Hardin v. Osborne*, 43 Miss. 532.

SIMRALL, J., delivered the opinion of the court :

The decree of the chancery court found that the moneys of the husband Meacham, paid for the land, and that the conveyance was made directly by Fitzgerald to Meacham's wife and children ; and that this transaction was in fraud of his creditors.



---

Opinion of the court.

---

After a sale had been made under the decree, the court directed, upon Meacham's petition, that \$1,500, part of the sale money, should be paid over to him in lieu of his homestead.

That decree is before us for review. Waiving all questions as to the time and mode of the application, we proceed to the inquiry whether H. B. Meacham had an exemption in the land.

The conveyance made to the wife and children not having been made by Meacham, the debtor is not within the statute of 13 Elizabeth, or our statute, which is essentially a transcript, on this subject. Code, 1857, p. —, art. —. Purchases with the debtor's money, in the name of a third person, are not embraced by the statute of frauds in terms. *Crozier v. Young*, 3 Monroe Rep., 157; *Gowing v. Rich*, 1 Ire. Law, 553. The statute only operates on *conveyances* made by the fraudulent debtor. *Lamplugh v. Lamplugh*, 1 Pr. Williams, 111. It is a maxim of the common law that fraud vitiates every transaction which it taints. Essentially the same principles exist at common law, as are declared by the statutes.

Prior to the enactment of the statute, but few cases had been decided; but these principles had been adopted into the common law; that a fraudulent conveyance was void, and the property might be taken on execution. Rolle's Abr., title Covin. After the death of the debtor the fraudulent grantee would be charged as executor *de son tort*. (Ibid.) The statutes rest upon the foundation of these principles, and are but an elaboration of them.

A debtor may innocently subtract from his resources, such means as may be reasonably necessary for the support of his family. His creditors, therefore, can not pursue and reach the money of the husband and father paid for such necessary purposes as the maintenance of the family and education of the children. But subject to that right, the debtor must devote his property and means to his creditors. If the husband takes money, which ought to pay his debts, and invests in the purchase of real estate, or other property, for wife and children, the transaction may be

---

Opinion of the court.

---

fraudulent or not, as the husband may be indebted or not, and then by a comparison of his debts with the resources retained by him. If he was insolvent at the time of the purchase, the evidence is overwhelming and conclusive, that the motive was to make a gift at the expense of creditors, and that the intent was to withdraw his means from their reach.

There has been difference, in the courts, as to the precise ground and principle upon which equity proceeds to reach and subject the land to creditors. This much is concurred in — that if the circumstances clearly indicate that the provision for the wife and children was contrived and intended to evade creditors, and their demands, then the debtor shall stand, for the purpose of satisfying creditors, in the same relation to the property, as though the conveyance had been made to himself. If the conveyance to wife and children was not made with the honest and laudable motive of making a reasonable advancement, but with the design of securing the property to the debtor's use, the Chancellor may treat the estate as held in trust for the debtor. *Fletcher v. Sidley*, 2 Vernon, 490. *Lloyd v. Read*, 1 Pr. W'ms, 607. *Roberts on Frauds*, 424. *Pole v. Pole*, 1 Ves. Sr., 76. That is, the advancement is not *bona fide*, but a mere subterfuge to hide the property from creditors, whilst the insolvent debtor may enjoy it. But if the debtor derives no personal benefit from the property, but the use is exclusively to the wife and children — if the debtor was insolvent — such a diversion and concealment of his means would be fraudulent. Money is liable to execution. *First v. Miller*, 4 Bibb, 311. *Turner v. Fendall*, 1 Cranch, 117. It was held by Underwood, J., in *Doyle v. Sleeper*, 1 Dana, 544, that it was fraudulent in a debtor to disable himself to pay his debts, by disposing of his money, in property, so that it can not be reached by legal process; and that it is fraudulent for a person to accept and hold as a gift, the money or property of a debtor, and thereby defeat the payment of pre-existing debts. If the money of the insolvent debtor has been converted into land, or other property

---

Opinion of the court.

---

for the donee, the creditor may pursue the debtor's funds into the property and subject that. Upon whatever theory the Chancellor proceeds, the fundamental principle is, that the insolvent debtor can not purchase property for his wife and children, so that they may hold it in defiance of his creditors. Such purchases of lands, though not within the letter and terms of the statute of frauds, are nevertheless condemned by the common law.

The conveyance procured to be made by Meacham to his wife and children was, in equity, as if made to himself. That is, the property would be esteemed his, at the suit of creditors. If Meacham had a residence with his family upon the property, he would be entitled to the homestead exemption, because the creditor could treat the conveyance, made by Fitzgerald at his instance, to his wife and children, as inoperative and of no effect. As between the creditors and Meacham, the property belonged to the latter. If he, therefore, fulfilled all the conditions imposed by the statute to constitute the right, it should have been allowed to him.

The decisions in other states have been quite uniform, that although there may have been a fraudulent conveyance, yet that does not defeat the homestead. *Legro v. Lord*, 10 Me., 161. *Vaughn v. Thompson*, 17 Ill., 78. *Wood v. Chambers*, 20 Texas, 247. *Lisby v. Perry*, 6 Bush., 515. *Pike v. Miles*, 23 Wis., 164, and cases cited by counsel for appellee. By referring to the statutes of these states, as expounded in these cases, it will be observed that there is an absolute, unconditional exemption of the homestead from liability to judicial process, so that the property could not be pursued by a creditor in the hands of a vendee. The homestead exemption was as broad and complete, as were personal effects under statute of 1857. Upon which there would be no lien, dormant or contingent, by judgment, upon which the creditor had no claim, although the debtor may have parted with the possession. *Smith v. Allen*, 39 Miss., 473.

It was held in *Whitworth v. Lyons*, 39 Miss., 467, followed in

---

Opinion of the court.

---

subsequent cases, that under the statute of 1857, the homestead was exempted on the condition of occupancy as a residence, and that when the occupancy was abandoned the right was gone, and the property was open to seizure and sale by judgment creditors, and to attachments. The distinguishing difference between this statute and those of the states to which we have referred is, that our statute makes the exemptions of the homestead dependent upon occupancy, whilst in the other states the exemption is absolute and unconditional.

Our statute of 1857 uses the words *owned* by and "occupied as a residence." We do not suppose that the word *owned* means anything more than the right or title by which the debtor occupies the premises. It is that "right" which the statute intends to protect. It matters not whether it be a freehold of inheritance, or less, or for a term of years, whether a legal or equitable estate, the creditor shall not interfere by legal process and break up the homestead.

The title of the exemptionist as said in *Lessley v. Phipps*, 49 Miss., 790, "is dependent on the facts of his being the head of a family, and residing upon the premises as a home. His title is manifested to creditors, by occupancy of the residence as head of a family. It is the implication of law from the facts."

Meacham was residing upon the property with his family, which the creditors subjected to their debts. He had such title to ownership as made the property liable, and therefore fulfills the conditions upon which the exemption depends. If his claim should be repudiated, the benefit intended by the statute will be denied to him. The case of *Phipps v. Lessley* is in point, to the effect that his right has not been lost.

The record does not contain evidence that the exempt homestead was worth \$1,500, or what it was worth. The case seems to have been brought into this court to consider the question rather of the "right," than the amount allowed.

Meacham cannot be allowed exceeding \$1,500. It may be

---

 Syllabus and briefs.
 

---

that what would be exempt to him would not be worth so much.

The decree is reversed, and cause remanded to the chancery court to make that enquiry.

---

**S. P. MARTIN v. DEWITT MINOR AND ALEXANDER MINOR.**

1. **ASSAULT AND BATTERY — PROVOCATION.** — The general rule on the subject of provocation is, that under the general issue, the defendant, in mitigation of damages, may give in evidence a "provocation," provided it was so recent and immediate as to induce a presumption that the violence was committed under the immediate influence of the passion excited by the provocation. 2 Greenleaf's Evid., Sec. 93.
2. **SAME — SAME — EXTENUATION.** — What is done under the influence of passion provoked by the opposite party at the time of the assault, is proper to be considered by the jury in extenuation of the offense. But what is done a day or two after the provocation received is not the result of that passion, but is the deliberate infliction of vengeance for an injury real or supposed. Collins v. Todd, 17 Mo., 537; Lee v. Woolsey, 19 Johns., R., 321; Coxe v. Whiting, 9 Missouri R., 531.

**ERROR to the Circuit Court of Marshall County. Hon. ORLANDO DAVIS, Judge.**

The opinion of the court contains a sufficient statement of the case.

*Watsons & Manning*, for plaintiff in error. Evidence of provocation in mitigation of damages or in justification of an assault, must show that it was recent, and that sufficient time from the provocation to the assault did not elapse to allow the passions excited thereby to cool. Therefore the evidence of provocation given sometime before the assault was inadmissible and should have been excluded. 2 Greenl. Ev., 93; 33 N. J. Law, 96; 17 Mo., 537; 17 Iowa, 468; 5 ib., 478; 3 Cold. (Tenn.), 240.

*Featherston, Harris & Watson* and *Strickland & Foot*, for defend-

---

Opinion of the court.

---

ants in error, filed an elaborate brief contending that under the circumstances, the ruling of the court below on the admissibility of evidence of provocation was correct. The testimony tended to show the *animus* of the parties at the time of the assault and battery by them upon Martin, the feelings by which they were prompted; that they had been deeply and sorely wronged; that Martin had been the seducer of their sister and the author of her ruin, and that by him a stigma had been cast upon the whole family. That the effect produced by the act of Martin continued with all its force in the minds of the defendants, there could be no doubt. So they acted under the influence of the passion thus excited, no matter how remote the cause, is sufficient. 2 Greenl. Ev., § 93. The proof may be made out by a train of conduct and circumstances and these circumstances must necessarily run back over a considerable period of time, embracing days, weeks and months, before the criminal conversation. 2 Greenl. Ev., §§ 51, 267. See *Fraser v. Berkley*, 2 M. & R., 3; *Dolan v. Fagan*, 63 Barb., 73; *Richardson v. Northrup*, 56 ib., 109; *Stetlar v. Nellis*, 60 ib., 524; *Meek & Thornton v. Perry and wife*, 36 Miss., 190; *Pool v. Bridges*, 4 Pick., 378; *Allen v. Duncan*, 11 ib., 309; 1 Greenl. Ev., 108.

PEYTON, C. J., delivered the opinion of the court:

This was an action brought by the plaintiff in error against the defendants in error, to recover damages for an assault and battery, alleged to have been committed in January, 1872. The defendants pleaded the general issue, with notice of special matter to be given in evidence, under that plea.

The cause was tried upon this issue, and the jury found for the plaintiff, and assessed his damage to five dollars. And from the judgment rendered upon this verdict, the case comes here for revision.

The first error assigned is the overruling of the plaintiff's objection to the testimony of Jennie Minor as to the paternity of her

---

Opinion of the court.

---

child ; and the second and third assignments of error impeach the correctness of the action of the court in overruling the plaintiff's objection to the testimony of Alex. Minor so far as it related to the information derived from Jennie Minor as to the paternity of her child, and in overruling the plaintiff's objection to the testimony of R Huie, Charles Benton and William Cofer, tending to show the resemblance of said child to the plaintiff.

The theory of the defense in the court below, seems to have been, that the defendants acted under the influence of the passions excited by the revelation made to them for the first time by their sister, Jennie Minor, on the 27th day of December, 1871, that the plaintiff was the father of her child, and that a day or two before that time, he had again made improper advances to her.

Was the testimony of these witnesses legal and proper evidence to go to the jury in mitigation of damages in this action? We think it was not.

The rule on this subject, as laid down by Greenleaf, is, that, under the general issue, the defendant, in mitigation of damages, may give in evidence a *provocation* by the plaintiff, provided it was so recent and immediate as to induce a presumption that the violence was committed under the immediate influence of the passion thus wrongfully excited by the plaintiff. The defendant in mitigation of damages may, under this issue, rely on any part of the *res gestæ*. 2 Greenleaf's Evid., sec. 93.

In the case of Collins v. Todd, 17 Missouri, 537, it was decided, in an action of trespass for an assault and battery, that evidence of abusive language towards the defendant's niece and sister, and sister-in-law, a day or two before the assault, was inadmissible in mitigation of damages. The law, out of respect to the frailty of human passions, may look with an eye of some indulgence upon the violations of good order, produced in the moment of irritation of, and excitement from, abusive language. But where there has been time for deliberation, the peace of society requires that

---

Opinion of the court.

---

men should suppress their passions, and neither reason nor law will suffer them to claim a diminution of their responsibility for their misconduct. There does not seem to be the same reason for the admission of abusive language unconnected with the transaction by contiguity of time and place.

It was determined, in the case of *Cox v. Whiting*, 9 Missouri, 531, that in action of trespass for an assault and battery, no matter of provocation can be given in evidence, unless it be so recent as to justify a fair presumption that the violence was done under the influence of the passions excited by it. On any other principle, the law would countenance the most revengeful feelings, and indirectly, also, an appeal by persons conceiving themselves injured, to force and violence. And this is believed to be the settled law on both sides of the Atlantic. 3 Barn. & Cress., 113; and 1 Ryan and Moody, 422; *Lee v. Woolsey*, 19 John., 321; and *Castner v. Sliker*, 33 New Jersey Law Rep., 95.

What is done under the influence of passion, provoked by the opposite party at the time of the assault, is proper to be considered by the jury in extenuation of the offense. But what is done a day or two after the provocation received, is not the result of that passion, but is the deliberate infliction of vengeance for an injury real or supposed; and this spirit of retaliation, however consonant it may be to the customs of society, the law does not countenance or tolerate.

In the case of *Thrall v. Knapp*, 17 Iowa, 468, it was held, in an action for damages for an assault and battery, all the circumstances which immediately accompany and give character to the transaction are admissible in evidence for the purpose of mitigating damages. But when the provocation is not immediate, but a sufficient time has elapsed for reflection and deliberation and reason to resume her throne, it is not admissible even in extenuation. And the like doctrine is to be found in the case of *Ireland v. Elliott*, 5 Iowa, 478.

Applying these principles to the facts of the case at bar, it is



---

Opinion of the court.

---

very clear that the action of the court below in admitting the testimony of Jennie Minor, Alex. Minor, R. Huie, Charles Benton and William Cofer, is erroneous.

It is assigned for error, that the court refused to give at the request of the plaintiff, the following instruction to the jury: "The law makes allowance for human frailty and passion, if a party greatly provoked resents such provocation immediately, and before there has been time for the blood to cool; still, if the party so provoked delays three or four weeks, no new provocation intervening, and then, with premeditation and deliberation, leaves his home at the dead hour of night, and travels a mile or two in pursuit of such aggressor, then rousing him from his bed, takes him out and whips and beats him; for such whipping and abuse, such previous provocation is neither a legal justification or excuse." This instruction propounds the law correctly, and should have been given to the jury.

The giving of the following instruction to the jury, at the request of the defendants, is made the subject of the fifth assignment of error: "If the jury believe from the evidence that the plaintiff did, some two or three years prior to the alleged assault and battery, seduce the sister of defendants, and by her beget a bastard child, and that a short time before the alleged assault and battery, renewed his proposals for further illicit intercourse with the sister of the defendants, and if they further believe from the evidence, that in the latter part of December, 1871, within less than one month of the alleged assault and battery, the sister of the defendants informed the defendants, for the first time, that Martin, the plaintiff, was the father of the child to which she had given birth, and that he had, within a few days prior to that time, renewed his proposals for further illicit intercourse with her, then these are facts and circumstances which the jury may properly weigh and consider in mitigation of damages." This instruction, it is believed, does not propound the law correctly, and it was error so to instruct the jury. The third instruction asked by de-

---

Brief for appellant.

---

fendants, and given by the court to the jury, is in substance the same as above stated, and equally erroneous as a legal proposition, and should not have been given.

For the reasons herein stated, the judgment must be reversed, and cause remanded for a new trial.

---

JOSEPH B. JONES v. B. C. FOSTER et al.

1. CHANCERY PRACTICE—MULTIFARIOUSNESS.—Where J., as guardian of certain minors, sold real estate on time, under an order of the probate court, and took notes for the purchase money, and F. becoming the purchaser; and afterwards, J. sold other real estate, as administrator, and F. became the purchaser again, and executed notes for the purchase money, J. filed his bill to enforce his lien on the notes payable to him, both as guardian and as administrator: *held*, that the bill was bad, for multifariousness.
2. SAME—SAME.—The bill cannot join several distinct, unconnected subjects, against the same defendant or against several defendants.
3. SAME—CASE IN JUDGMENT.—A party cannot be pursued in the same suit in the double capacity of guardian and administrator, because the liabilities are separate and independent. *Wren v. Gayden*, 1 How., 365. The complainant, representing in his own person, separate and independent capacities and rights, and the defendant F. is pursued in respect to separate and distinct estates, acquired indifferent rights. Where several subjects are united, it must appear, that as to the subject matters and the relief, all the defendants are connected, though differently, with the entire subject in dispute. *Watson v. Cox*, 1 Ired. Eq. Rep., 289; *Adams' Eq*, 601, 602.

APPEAL from the Chancery Court of Covich County. Hon. E. G. PEYTON, Jr., Chancellor.

The opinion of the court contains a sufficient statement of the facts in the case.

*Harris & George*, for appellant:

It is the settled doctrine in this state, that where an administrator takes a note payable to himself, although it was given for

---

Brief for appellant.

---

property of his intestate, he may sue in his individual character. The same rule is applicable to guardians. *Laugham v. Thompson*, 6 S. & M., 259; *Eckford v. Hogan*, 44 Miss., 398; *Trotter v. White*, 10 S. & M., 607. As to guardians, see *Eckford v. Hogan*, *supra*, where it is said that where a note is payable to guardian, who dies, the administrator may sue. The legal title to all the lands and the judgment, was in Jones individually. So that Jones had the right to treat all the bonds as his, being responsible to the court, to account for them, and they were all due by the same man.

It was a convenient and proper mode of procedure, since the court could so frame the decree as to direct the two tracts to be sold separately.

If Foster still owned both tracts, it could not be doubted that the suit he brought would be proper, and we do not perceive why those desiring title to part of the land from Foster, could not be joined with him.

We do not see that bringing in Graves, the holder of the legal title to part of the land, violates any rule. If this was wrong, the demurrer should have been confined to that. The omission to make him a party would doubtless have frustrated the sale.

Upon the whole the bill seems to be convenient and proper, and not affecting any one injuriously.

There is, in Story's Equity Pleading, a passage which illustrates the principle governing this case, § 271, a. Here there is a connection. First, the purchaser from the administrator and guardian, owes the whole debt, and is bound to relieve his purchaser. Second, the purchaser from him is connected with every party in the suit, having purchased the whole of one tract of land, and part of the other, the lands held by him or by his heirs is liable to the claims of all the bondholders — to those who hold the bonds given to the administrators, as well as those who hold the bonds given to the guardian. So that each of the parties to whom Jones transferred bond (to one he transferred a guardian's,

---

Brief for appellees.

---

and to the other an administrator's bond) would be compelled to make the heir of Foster's vendee, and Foster and Jones, parties to his bill to foreclose the mortgage. Jones, whether he sue on the administrator's bond or guardian's bond, must make Foster and the heirs of his vendee, and one of the holders of the bonds be transferred a party. The only thing that can be said, therefore is, that the two transfers are misjoined, and this is no ground for a demurrer by all the parties, and no ground to dismiss the bill.

*H. B. Mays*, for appellees :

The original bill is multifarious, and is made more objectionable in this respect by the supplemental bill. If Jones & Foster were the only parties to the original bill, it would be multifarious in attempting to embrace *too many objects*, for it is a rule of equity that two or more distinct subjects cannot be embraced in the same suit. 1 Daniels' Ch. Prac., 437; Wren v. Gayden, 1 How. Miss. Rep., 366, 377. Though Jones is authorized to receive the amount due on each sale, and though the entire sum of money is due from Foster, the separate statutory liens may not be enforced in the same suit, because the right in which Jones proceeds, and the subject matter of each lien, are entirely separate and distinct. Story's Eq. Pl., § 271, p. 295. In the Attorney Gen'l v. Goldsmith Co., Sir L. Shadwell, V. C., says: "I apprehend that, besides what Lord Redsdale has laid down upon the subject, there is a rule arising out of the constant practice of the court, that it is not competent where A. is sole plaintiff, and B. is sole defendant, for A. to unite in his bill against B. all sorts of matters wherein they are mutually concerned. If such a mode of proceedings were allowed, we should have A. filing a bill against B., praying to foreclose a mortgage, and in the same bill praying to redeem another, and asking many other kinds of relief with respect to many other subjects of complaint." 3 Vol. New Lib. of Law and Eq., 1st Daniel Ch. Pr., 346, 347. If the administrator of W. H. Allen and the guardian of the several infants were distinct persons, it would be clear they could not unite in the same bill, to

---

Brief for appellees.

---

enforce their respective liens for the purchase money, for there would be no connection between the parties interested in the separate estates sold, and the interests are quite as distinct, though they centre in the same trustee. *Wren v. Gayden*, 1 How., 365, 366, 367. This belongs to that class of cases, in which a court may very properly interfere and dismiss the bill for multifariousness, with a view to the *order and regularity of its proceedings*. 3 Vol. New Lib. of Law and Eq., Daniel Ch. Pr., 267; Story's Eq. Pl., 271. If Jones should die after the decree is rendered, and one is appointed administrator *de bonis non* and another guardian, who will execute the decree and receive the money, this might result in still more vexatious litigation. *Prestidge v. Pandleton*, 2 Cush., 80; *Miller v. Helm*, 2 S. & M., 687. By the amended bill, Graves is introduced as a defendant, and the bill proposes to obtain these several objects: 1. To enforce a lien for purchase money due for land which Jones sold as administrator. 2. To enforce a lien for purchase money for lands which Jones sold as guardian. 3. To compel Graves to convey the legal title of the lands Jones had sold as guardian to him, who may purchase under the decree he now prays, in the discharge of the obligation of a bond for title Graves had given W. C. & R. R. Allen from whom the land descended to the wards of Jones.

1. This bond was executed by Graves in the lifetime of W. C. & R. R. Allen, and before the sale of Jones to Foster, and imposes no obligation or duty on any party to the bill, except the defendant, Graves, and should be the subject of a separate bill against Graves for specific performance of his contract with W. C. & R. R. Allen. 3 New Lib. Law and Eq., 1 Daniel Ch. Pr., 442-3; 1 How. Miss. Rep., 510.

2. Graves can have no interest whatever in the land sold by Jones as administrator, nor has he any interest in either account which Jones proposes to take of the purchase money due him, in his double capacity from Foster. *Ib.*, top p. 262, marg. p. 442-3.

3. The wards of Jones can have no interest in the administra-

---

Opinion of the court.

---

tor's sale, nor in the account of money due Jones as administrator.

4. The estate of W. H. Allen, nor his creditors or distributees have any interest in the guardian sale, nor in an account of purchase money due Jones in the character of guardian.

5. Susan Martin, nor her representative, McRea, have any interest in the land sold at administrator's sale, nor in the account of balance of purchase money due.

6. Millsaps has no interest in the land sold at guardian's sale, nor in the account of balance of purchase money due. See *Wren v. Gayden*, 1 How., 365-510; *Thoms v. Thoms et al.*, 45 Miss., 277; *Darcey v. Lake*, 46 Miss., 115-16; *Roberts v. Starke*, 47 Miss., 257; 1 Daniel Ch. Pr. Tappan 259, marg. page 437; *Boyd v. Hoyte*, 5 Paige, Ch. R., 78-79; *Gibbs v. Clagett*, 2 Gill & J. R., 29; *Story's Eq. Pl.*, sec. 271; *Saxton v. Davis*, 18 Veasy., 80.

In the court below, there was *no application to amend*, the plaintiff choosing to *rely upon the supposed error of the court*, in dismissing the bill. A demurrer to a bill in chancery is substantially the same as a demurrer to a declaration at law for a misjoinder of parties, or of different causes of action which cannot be properly litigated in the same suit. The demurrer in either case goes to the whole bill or declaration. *Boyd v. Hoyte*, 5 Paige Ch. Rep., 79. "If a bill be liable to be dismissed for multifariousness, it ought to be dismissed *in toto*, and not made the foundation of partial relief." *Gibbs v. Clagett*, 2 Gill & J., 29. A multifarious bill may be dismissed by the court on its own motion if not objected to by the defendant. *Story Eq. Pl.*, 271; *Daniel Ch. Pr.*, 451.

SIMRALL, J., delivered the opinion of the court.

In 1860, Jones, the appellant, sold, under decree of the probate court, as guardian for Robert L., William L. and Frances E. Allen, minors, his wards, certain real estate, on a credit. B. C.

---

Opinion of the court.

---

Foster became the purchaser and executed his bonds for the purchase money, with Ford and Lowe as his surities. Of these bonds, Jones transferred the one first due (1st Jan., 1861,) to Susan Morton, the greater part of which has been paid.

In the same year, 1860, Jones, as the administrator of W. H. Allen, deceased, sold certain real estate of which his intestate died seized, of which B. C. Foster also became purchaser, and gave two bonds with sureties for the purchase money; one due 1st Jan., 1861, the other the same day the succeeding year. The first of these last named bonds was assigned to Uriah Millsaps. The greater part of it, however has been paid.

Subsequently Foster sold and conveyed the land purchased by him at the guardian's sale, and part of that bought at administrator's to I. C. Hood. Hood has since died leaving a widow and children who are made defendants.

The amended and supplemental bill, in addition to the foregoing facts, states that one Eli Graves bargained and sold one quarter section of the land, to wit: (S. E.  $\frac{1}{4}$  of sec. 8, town 2, range 3 west), to R. R. and W. C. Allen, who are the ancestors from whom the land descended to the above named wards. That a bond was given to make title when the purchase money was paid, which was long ago done. That Graves is in possession of part of the quarter section, and the residue is in the possession of A. Wheeler, Edmund F. Graves and Dandridge Hodges. The object of the bill is to enforce the statutory mortgages upon the several tracts of land sold and conveyed by Jones as guardian and as administrator, and for a conveyance of the quarter section, to which E. Graves has the legal title.

To the original and supplemental amended bills, demurrers were filed by Foster and Eli Graves, which were sustained by the chancellor on the grounds of multifariousness.

In *Roberts v. Starke*, 47 Miss. Rep., 261, the principles to be applied as tests of multifariousness are attempted to be stated. Among other rules is this one, "The bill can not join several dis-

---

Opinion of the court.

---

inct, unconnected subjects against the same defendant or against several defendants."

Jones has two mortgage liens on distinct parcels of land, as securities for two separate debts due to him in different rights. Securities for debts due to the complainant as guardian, and as administrator, are as completely in several rights as though one were to protect a debt to him as guardian, and the other a debt to himself personally.

The beneficiaries of the respective funds, that may be realized from the two sales, may be, and in all probability are different persons. The money arising from the guardian's sale would belong to his wards. The money produced by the administrator's sale would properly be devoted to the debts, and that sale was made in the interest of creditors. There is no unity of interest or priority between a guardian and an administrator.

Counsel for appellant are correct in the proposition, that Jones might have united in the same action at law the bonds payable to himself "as guardian," and as "administrator," because these words would have been treated as *descriptio personæ*. A court of law looks exclusively to the legal title, and takes no notice of equities, except as the equitable owner of the fund may appear upon the record as usee.

In *Wren v. Gayden*, 1 How., 365, it was held that a party could not be pursued in the same suit in the double capacity of guardian and administrator, because the liabilities were separate and independent.

There is another rule which this bill violates: "If the complainant claims under one title, he may join several defendants who claim the estate under several and distinct purchases." *Dalafeld v. Anderson*, 7 S. & M., 630; *Gaines v. Chew*, 2 How., U. S., 619. But this complainant represents in his person separate and independent capacities and rights, and the defendant, Fowler, is pursued in respect to separate and distinct estates acquired in different rights. The complainant does not sue upon two mort-



---

Brief for appellant.

---

gages due to him in the same character, as either guardian or as administrator, upon both of which the defendant is liable, if that were admissible.

But when several subjects are united, it must appear, that as to the subject matters and the relief, that all the defendants are connected, though differently, with the entire subject in dispute. *Watson v. Cox*, 1 Ired. Eq. Rep., 289; *Adams Eq.*, 601, 602. The defendant Graves and three other parties, are only interested in one-fourth section, part of the land sold, as administrator, and have no concern with the other land embraced in that sale, nor with the lands sold by Jones as guardian. We think there was no error in the decree.

And it is affirmed.

---

J. V. DONIPHAN v. THE STATE.

1. **RECOGNIZANCE — FORFEITURE — RELEASE.** — S. was indicted for larceny, entered into recognizance with plaintiff in error as his surety, on the bond in May, 1872; forfeiture was taken and judgment rendered against principal and surety in 1873. The act of the legislature entitled "an act to amend the rules of practice and procedure in criminal cases in this state," was approved April 5, 1872, and took effect the 5th of June, 1872. Sec. 9, art. 12, const.: *held*, that the court erred in rendering judgment in this case. The plaintiff in error is entitled to the benefit of the act referred to, and should have been released.

ERROR to the Circuit Court of Washington County. Hon. C. C. SHACKELFORD, Judge.

The facts in the case are stated in the opinion of the court, and in the argument of counsel.

*Nugent & Yerger*, for plaintiff in error:

In this case, the simple question involved is, whether the bail bond executed by John V. Doniphan, as surety for Don Steele, who was indicted for petty larceny in April, 1872, became void

---

Opinion of the court.

---

by reason of the act of the legislature, entitled "an act to amend the rules of practice and procedure in criminal cases in this state," approved April 5, 1872. There was no time specified in the act when it should take effect, and under the provisions of the constitution it became operative on the 5th of June, 1872. *Swan v. Buck*, 40 Miss., 268; *West Feliciana R. R. Co. v. Johnston*, 5 How., 273. The bond in the case was given to secure the appearance of Steele to answer the state on a charge of "gaming and larceny," and the indictment is for stealing "five dollars lawful money of the United States," so that the judgment seems to have been entered upon a bond that was not given in the case at all. Ditto's case, 30 Miss., 126; *Douthit's case*, ib., 133.

*J. S. Morris*, Attorney General, for the state.

TARBELL, J., delivered the opinion of the court.

Don Steele was indicted for petty larceny in April, 1872. In May thereafter, he entered into the usual recognizance for his appearance, with the plaintiff in error as his surety. Judgment of forfeiture was rendered against principal and surety in 1873. From the judgment the surety prosecuted a writ of error, and it is claimed that the bond became void by reason of the act of the legislature, entitled "an act to amend the rules of practice and procedure in criminal cases in this state," approved April 5, 1872. There was no time specified in the act when it should take effect. In such case it was not in force until June 5, 1872. Sec. 9, art. 12, Const., Code, p. 666.

Sec. 9 of the act to amend the criminal practice, approved April 5, 1872, enacts, "that in all cases where any person has heretofore given bail or security on recognizance for his own appearance, or where any person has become bail or security, or recognizance for the appearance of any other person, whether said bail bonds are now pending in the several courts to which they were made returnable, or whether such bonds have been forfeited and proceedings thereon have been instituted, such bonds are hereby declared void

---

Syllabus.

---

and of no effect; and all proceedings now pending upon any forfeiture as aforesaid are hereby suspended, and the same ordered to be dismissed at the next term of the several courts in which the same are now pending."

The case presented before the court below was this: Recognizance in May, 1872. The statute above quoted spoke from June 5, 1872, declaring prior recognizances void, and directed the courts in which they were pending, to dismiss proceedings thereon at their next term. Instead, in the case at bar, judgment was rendered upon the recognizance. Accepting the law as obligatory, this was error.

Judgment reversed and proceedings dismissed.

---

EMMA NICHOLSON, Ex'x, v. SARAH HEIDERHOFF et al.

1. **MARRIED WOMEN — CONTRACTS OF.**— An obligation or promise to pay for property, bought on a credit, by a married woman, is not embraced in that class of contracts mentioned in the statute, and is not enforceable out of her separate estate. Code, 1857, art. 25. If such a liability is incurred, the wife may set up her disability as absolving her from it, which is a defense against the debt and any security which may accompany it. *Whitworth v. Carter*, 48 Miss. R., 72.
2. **SAME — ELECTION TO RECEDE FROM CONTRACT.**— Where a married woman buys property on credit, she has her election either to recede from the bargain and claim its annulment, or allow it to stand with a right in the vendor to subject the property to the payment of the debt; beyond that the vendor could not go, and coerce payment out of her other property. But she cannot retain possession of the legal title and plead her disability in annulment of her obligation and security for the purchase money. *Gordon v. Manning*, 44 Miss. R., 756.
3. **SAME — SALE TO A MARRIED WOMAN ON CREDIT.**— The sale and conveyance of property to a married woman on credit is a voidable contract on her part. She may make the payments, whereby the act becomes complete and executed. If the vendor seeks relief in equity, or any security reserved or made by her, the decree will be framed so as to conform to the election she may make in her answer. If a married woman sells and

---

Statement of the case.

---

conveys property bought on a credit, her alienee cannot defeat the liens which the vendor has taken, on the allegation that his vendee was covert. Such alienation would be taken as a conclusive waiver of the privilege of disability, and the incumbrances which were voidable as to her, become conclusive upon her vendee.

APPEAL from the Chancery Court of Hancock County. Hon. G. S. McMILLAN, Chancellor.

This is a bill to foreclose a mortgage.

The bill alleges that John Nicholson, the husband of complainant, on the 27th of January, 1869, sold and conveyed to Sarah Heiderhoff, wife of F. Heiderhoff, a lot of land in the city of Shieldsborough, for the sum of \$1,200, taking therefor their joint four notes for \$300 each, payable at 6, 12, 18 and 24 months from date of deed.

That to secure the payment of the said notes, the said Heiderhoff and wife executed a deed of mortgage of the same property.

The condition of said deed was that if the said Sarah Heiderhoff should pay or cause to be paid said four promissory notes according to their tenor and effect, then said mortgage deed should be void, etc. The bill alleges that said Nicholson took no other security, and avers that said Nicholson had a vendor's lien. The bill alleges that said notes have not been paid, and prays that an account may be taken, and that, on final hearing, "the said Sarah Heiderhoff and Frank Heiderhoff, her husband, may be decreed to pay — the said principal and interest, and in default thereof, that the mortgage be foreclosed and property sold, etc." The deed from Nicholson to Sarah Heiderhoff does not show that her husband was a party to the contract at all. See Exhibit B, folios 14, 15 and 16. The notes filed as Exhibits C, D and E are drawn in the singular number, and signed by "Sarah Heiderhoff," and by "Frank Heiderhoff, her husband."

On the same day, (January 29, 1869,) the said Sarah and F. Heiderhoff, reconvey the same property to secure payment by way of mortgage.

---

Statement of the case.

---

On February 15th, 1872, the defendants, by leave of court, filed their separate answers.

The said Sarah Heiderhoff admits the conveyance to her by Nicholson, and the execution of the notes, and the reconveyance by way of mortgage, to secure the payment of the notes, and alleges that one of the notes has been paid by her. She avers that said promissory notes are void, because she was at the time a married woman, because she had no power to buy property (real estate) on a credit, and that said notes were absolutely void; that her husband signed said notes not as her security, but under a mistake of law, that his signing the same would make them valid and binding against her, and in her answer prays the same benefit as though she had demurred to the bill. That she is informed by her husband, and so believes the fact to be, that he had paid the three promissory notes. The answer is sworn to.

F. Heiderhoff files a separate answer, in which he admits the sale by Nicholson to his wife, the execution of the notes and the mortgage, and avers that the first note was paid and cancelled. That said sale on a credit to his wife was void, and the notes given were void in law and equity. That he signed the notes not as security, but under the mistake of law that by doing so, he made his wife's notes valid.

He alleges and avers that said mortgage deed is void —

1. Because there was no consideration for such conveyance, the notes being absolutely void.
2. Because he was not bound to pay said notes, either as principal or security.
3. Because by said mortgage deed it was provided that said Sarah Heiderhoff should pay the said notes.
4. Because he had no interest in the property conveyed.
5. Because, if the notes were valid and binding on him, the mortgage was void, because his wife could not mortgage her property to pay his debt.

For all these reasons he demurs to the bill, and prays that he

---

Statement of the case.

---

may have the same benefit as though he had demurred to the same. He then avers that said notes had all of them been paid to said Nicholson in his life-time, and that said Nicholson had acknowledged that the same were paid, and filed his account, which he prayed might be taken and deemed an offset to the claim. At the October term, 1872, of said court, the complainant had the case referred to a Master, who took and stated an account amounting to \$1,170. The respondents moved the court to set aside the report—

1. Because no notice was given to them of the time and place of stating the account.
2. Because he did not allow them to prove the amount filed as a setoff.

This motion was overruled and the report confirmed. The defendant filed an affidavit that he had good reason to believe, and did believe that it was essential that his oral testimony should be taken in open court. This application was overruled, and a final decree rendered against respondents. By this decree the said notes are declared to be void in law and equity, and that the deed from John Nicholson to Sarah Heiderhoff is null and void, and the same is revoked and set aside, and the respondents are enjoined from ever setting it up as a title, etc., and that the writ of assistance issue to turn them out of possession, and that defendants pay the costs of this suit.

From this decree defendants prayed an appeal, which was granted.

The following is the assignment of errors :

The appellants now come and assign the following errors in the record, proceedings and final decree, viz:

First. The court erred in not sustaining the demurrer of defendants made in their answers, for the reasons therein assigned.

Second. The court erred in confirming the master's report, and in overruling defendant's exceptions to it.

---

Brief for appellant.

---

Third. The court erred in not permitting the defendant, F. Heiderhoff, to give evidence in open court.

Fourth. The court erred in rendering a final decree for complainant and for an injunction —

1. Because the allegations of the bill make no predicate for such decree.

2. Because the bill alleges that the promissory notes and mortgage are valid and legal, and prays that the defendants may be required to pay the same, or the property sold, and the decree declares notes and mortgage void.

Fifth. Because said decree imposes the costs upon the defendants.

Sixth. Because the decree gives the possession of the mortgaged property to complainant, and grants the writ of assistance to put the defendants out of possession, which is not prayed for in complainant's bill, and the result of the suit amounts to a judgment in ejectment by a chancery court.

For these errors the defendants pray that the case be reversed, and the complainant's bill be dismissed with costs, etc.

*Champlin & Henderson*, for appellants.

We believe it is apparent from an examination of the record, that the decree in this case ought to be reversed, and the bill dismissed.

The bill avers a sale to a *feme covert*, of land on a credit, the execution of her notes, with her husband, for the consideration, and mortgage to secure the payment of the notes. The bill prays for an account and decree, that appellants pay the amount found due, or in default of payment, that the land be sold to satisfy the same, and the defendants' equity of redemption forever foreclosed.

In the case of *Whitworth v. Carter*, 43 Miss. Rep., fol. 61, which was an action at law, this court held that the note was *void as to the feme covert*, but was valid as to the sureties, and judgment was rendered against them.

---

Brief for appellant.

---

In the case of Foxworth v. Bullock *et al.*, in 44 Miss. Rep., fol. 457, which was an action in chancery, this court held that "a married woman could not bind herself, by promissory note or otherwise, to pay for property bought upon a credit," fol. 463. That her note was *nudum pactum*. The court also says in substance that a married woman cannot buy on a credit, and retain the property, etc. That vendor would have a right to be restored to his property *in esse*. How restored?

In this case the defendants below filed their answer, alleging that the notes were void as to the wife, and that the husband signed the notes not as security, but under a mistake of law, that by doing so, it made his wife's notes valid.

It is clear that if Mrs. Heiderhoff's notes were void, then no decree could be rendered against her, and if it be conceded that her husband was bound on the notes, then no decree in chancery could be rendered against him, and no decree that his wife's property should be sold to pay his debt :

1. Because by said notes it will appear that he did not promise to pay them.

2. Because his wife's property could not be taken to pay his debt.

We think the complainants have mistaken their remedy. We admit that Mrs. Heiderhoff cannot hold this property without paying for it, but we think if complainant sought her remedy in chancery, she ought to have averred by her bill, that the sale, notes and mortgage were void, and offered to have them canceled, and to pay back the three hundred dollars which they had received, and that an account of the rents and profits should be taken, and that the defendant might set off against such rents any valuable improvements made on the property. In fact, the bill ought to have offered to put the parties in *statu quo*.

But it is doubtful whether this would have been the proper remedy. If the decree taken by complainant was at all warranted by the facts of the case, then complainants had no remedy in equity.



---

Brief for appellees.

---

The decree is, that the notes given by Mrs. Heiderhoff are *null and void*, both in law and equity, and that the deed made to her by John Nicholson, being on a credit, is *null and void*; if so, the mortgage is *null and void*, and we cannot see how a suit, either at law or in equity, can be maintained upon a void contract.

The parties are bound by their bill. They cannot set forth a mortgage and pray a foreclosure, and then take a decree that the notes, deed and mortgage are void, and take a decree for the possession of the property. This, in substance, is a judgment in ejectment in a chancery court, and that, too, without any predicate for the decree.

Again, by the decree a perpetual injunction is decreed, when there is no prayer for an injunction in the bill. An injunction is never granted, unless specially prayed for. We refer to Story Equity Pleadings, secs. 40 to 43 and 257.

*Harris & George*, for appellees :

The general principle which controls this case is settled in *Gordon v. Manning*, 44 Miss., 756, that is to say, the complainant's right to relief is by that case established.

This is a mortgage, and in that case it was a vendor's lien. The treatment of the case by the court below varies from the rule suggested in *Gordon v. Manning*, but that is to be ascribed to the attitude which the defendants (appellants) took in the case.

The allegations of the bill are fully admitted by the answer. The husband and wife both assert, as a defense, that the husband signed the notes as he signed the mortgage, merely to express his assent and not to convey title or to incur liability, and the form of the note and the language of the mortgage give countenance to this idea. The note is, "I promise," and the condition of mortgage is not that the husband shall pay, but that the wife shall pay.

The complainant and the court accepted the case as the defendants chose to treat it, that is, the notes and mortgage, but carried their theory of the case out to its legitimate consequences and declared the deed void.

---

Brief for appellees.

---

There was no necessity for an account for the use of the property, which the defendants have enjoyed from the date of the deed, Jan'y 27, 1869, to this time, nor of the note paid, because that was *not paid by the wife*, but by the husband, as he states in his answer, and the wife does not in her answer aver payment by herself, but that the note was paid. What claim has Sarah Heiderhoff to any surplus which a sale might produce, after her explicit renunciation of her contract in court?

The defendant, F. Heiderhoff, could not be heard to establish his account against the deceased, Nicholson, hence the objection that he was not allowed to be sworn would be of no avail, even if it was his right generally to be allowed to testify. His deposition had not been taken. See Rev. Code, 209, § 1076.

If the contract of purchase was voidable, at the election of the wife, it was so only because it was on a credit, that is, *because she could not bind her estate for the purchase money*. When a payment was made, as to that, it was no longer voidable, for there no longer remained, as to that, any attempt to make her liable. In all cases, where a married woman buys property on a credit, the invalidity of the contract being based entirely on the credit feature, then when that is removed by payment, the contract is good.

The rule does not work the effect to allow the vendor, after having received a part, to invalidate the sale, take the property back and keep what he has received. He has no such right to treat the contract as void, arises on the point that the *feme covert* sets up her disability, and as a consequence of it, the law holding in his favor, that if the woman sets up her inability and refuses to pay, then he is released. And as this right never accrues till that repudiation is made, and as the result of it, it follows that when such repudiation is made, the woman has the right to take the property and the contract, just as it then exists. The wife may prevent a forfeiture of the cash payment, by submitting to a sale and claiming the surplus. But in this case nothing of that sort is done. She sets up the invalidity of the entire contract,

---

Opinion of the court.

---

and the court decrees accordingly, and now she complains. No one can assign for error, the action of the court below, brought about at his own instance. The prayer of the bill is for general relief, and is ample to cover the relief granted; upon the whole, it is submitted that the decree is just, and should be affirmed.

SIMRALL, J., delivered the opinion of the court.

In the deed conveying the house and lot to Mrs. Heiderhoof, there is reserved a lien to secure the purchase money. She, with her husband, contemporaneously with the date of the conveyance to her, also mortgaged the premises to Nicholson, the complainant's intestate, to secure the debt represented by the promissory notes of her husband and herself.

The bill brought by the executrix of the vendor, sought a foreclosure of the equitable lien reserved in the grantee's deed, and also the mortgage for the payment of the last three notes of \$300 each, the first one having been paid. In their answers, both Mrs. Heiderhoff and her husband allege that he signed the notes, not as surety for her, or to be bound thereby to pay the money, but under a mistake of law, that such act was necessary to give his consent to the purchase. Mrs. Heiderhoff sets up her coverture, as conclusive reason that the transaction of purchase, the notes and mortgage, are void in law and equity, and cannot be enforced against her. The husband relies upon the same defense, and in addition, sets up that he had paid the notes by work and labor done for the testator.

The bill contained the prayer for general relief, in these words: "And if in any or all this, your oratrix is mistaken in anywise, then she prays for such other and further relief as her cause may require, and as to equity and good conscience may seem meet."

Under the statutes respecting married women, and their separate estates, it has been held in repeated decisions, that the disability of coverture is as at common law, unless the married woman has a separate estate. That her power of disposition, or

---

Opinion of the court.

---

to charge or bind her separate property, or to incur debts to be satisfied out of it, is defined and limited by the statutes; and that thus far, she has legal capacity, enforceable out of the estate in a court of law. The 25th art. Laws 1857, p. 72, expressly authorizes her to "purchase property, real or personal," but the immediately ensuing clause intends that she must pay presently the money. *Whitworth v. Carter*, 43 Miss., 72. She can not obligate herself to pay for property bought upon a credit. *Foxworth v. Bullock*, 44 Miss., 457. The principle may be stated in this form. An obligation or promise to pay for property, bought on a credit, is not embraced in that class of contracts, mentioned in the statute, and is not enforceable out of her separate estate. If such a liability is incurred, the wife may set up her disability as absolving her from it; which is a defense against the debt, and any security which may accompany it. More is implied, when she is sued in chancery upon the express lien reserved by the vendor, or upon the mortgage to secure the notes for the purchase money — and relies upon coverture in bar of the relief — than a decree, absolving her from the debt. It is on her part a repudiation of the whole transaction, as well the conveyance by the vendor, as her notes and mortgage. In such a case it would be grossly inequitable to release her from the debt and mortgage, leaving the vendor embarrassed, with a deed outstanding in her favor.

The defense applies to each element of the bargain and sale, and one part should not be left operative whilst the others are cancelled, if the mortgage and notes are cancelled; the same result ought to be declared in reference to the conveyance made by the vendor.

Mrs. Heiderhoff had her election, either to recede from her bargain, and claim its annulment, or to allow it to stand with a right in the complainant to subject the property to the payment of the debt; beyond that the complainant could not go, and coerce payment out of her other property, when the mortgaged property was exhausted; there was no right at law or equity, to

---

Opinion of the court.

---

proceed against her other estate. If the property on a sale realized more than the debt, then the defendant would be entitled to the surplus. She will not be tolerated to plead her disability, in annulment of her obligations and security for the purchase money, and at the same time retain the legal title to the estate. *Gordon v. Manning*, 44 Miss. Rep., 756. It would hardly be controverted, that if Mrs. Heiderhoff had by plea of coverture defeated a recovery at law on the notes, that then the vendor or his heirs could have brought a suit in equity for the cancellation of the deed to her. If she asserts the same defense to the suit in equity, to apply the lien security to the satisfaction of the notes, the litigation is pending in a forum with ample powers to adjust its decree, so that complete justice may be done. There could be no obstacle in the way of declaring the conveyance to her inoperative and of no effect, as well as her notes and mortgage, unless it be a want of adaptation, and fitness in the pleadings for such a *decree*.

The general rule is that although the specific relief asked may not be granted, the complainant may have any other redress, warranted by the case made in the bill, and the principles of equity. This bill discloses that the sale and conveyance was made to a *feme covert*, and her securities taken for the purchase money. It might have been better pleading to have prayed in the alternative, for a foreclosure of the liens, if the defendant stood by her contract; but if she choose to disaffirm it, then that the conveyance to her be cancelled, and possession acquired under it be restored. But it is consistent with the case made in the bill, if Mrs. Heiderhoff elects to avoid the purchase of the property, to pronounce a decree avoiding the entire contract in all of its parts and members. The complainant makes every allegation necessary to be made, either to enforce the liens or to avoid the conveyance of her testator. It remained with Mrs. Heiderhoff, in her answer, either to let the purchase stand good and the liens operative, or to repudiate the whole matter. If the decree had stopped with the declaration of invalidity as to the notes and liens, then another suit or

---

Opinion of the court.

---

suits would have been necessary to annul the conveyance to her, and be restored to possession, and yet in such a suit, not a single fact, in addition to those embraced in this record, would have been requisite to the granting of the relief.

The sale and conveyance of property to a married woman, on a credit, is a voidable contract on her part. She may make the payments, whereby the act becomes complete and executed. If the vendor seeks relief in equity, on any security reserved or made by her, the decree will be framed so as to conform to the election which she may make in her answer. Suppose she has paid two-thirds of the price, and that the property is worth two or three times as much as the balance of the debt. Manifestly her interest would be promoted by recognizing the sale and permitting the lien to stand for the unpaid balance, for if the property went to a sale, the large excess, after satisfying her debt, would go to her. If the property is of less value than the debt, she can suffer no harm by a foreclosure of the lien, for the deficit can not be charged upon, or collected out of her separate estate.

By the character of the defense made in this case, we must assume that Mrs. Heiderhoff did not consider the property worth more, if as much as the balance due upon it. She therefore preferred the annulment of the contract.

Coverture is a personal disability, to be availed of by the *feme covert*. If Mrs. Heiderhoff and her husband had sold and conveyed the house and lot to a third person, the alienee could not have defeated the lien which her vendor had taken, on the allegation that his vendor was covert. The alienation would be taken as conclusive waiver of the privilege of disability; and the incumbrances which were voidable as to her become conclusive upon her vendee.

We think substantial justice has been done by the decree, wherefore, it is affirmed.

---

Syllabus and brief for appellant.

---

M. C. BRADY, Dist. Att'y, ex rel. etc. v. O. F. WEST.

1. ELECTION — NEW COUNTIES. — Art. IV., sec. 87 of Const., and art. V., sec. 18. Under those sections of the constitution empowering the legislature to create new counties, and declaring that all vacancies (in offices) not provided in the constitution, shall be filled in such manner as the legislature may prescribe. The act of the legislature conferring power upon the governor to appoint a chancery clerk for the newly created county, to continue in office until the next general election, is constitutional and valid.
2. SAME. — Art. IV., sec. 88 of Const. — The appointment of W. by the governor would have been legal, and would have conferred the office upon him, except that W. was a member of the legislature when the bill passed creating the new county. Being such member, he was incompetent under sec. 88, art. IV. of constitution to take and hold the office.
3. The act of the legislature under which McC. was elected, has been by this court declared unconstitutional and void. He therefore by his election acquired no right to the office.
4. FEE AND SALARY BILL — VOID. — The act of the legislature, commonly called the "fee and salary bill," has not the effect of law. Because the bill approved by the governor, as shown by the journals of the two houses of the legislature, is not the bill that passed those bodies. The bill bears upon its face evidence of erasure and interlineations, and the use of figures, without any indication of their value, which makes it unintelligible in many important particulars.

*Quære.* — If McCracken was without valid claim, could he call in question the right of West? If not, ought this court to pass upon it? Per TARBELL, J.

ERROR to the Circuit Court of Tate County. Hon. E. S. FISHER, Judge.

The opinion of the court contains a sufficient statement of the case.

*White & Chalmers*, for plaintiff in error:

Under section 19 of article VI., of the constitution, which provides that "the clerk of the chancery court shall be elected by the qualified voters of their several counties," the authority given by the legislature to the governor to make the appointment to the

---

Brief for appellant.

---

office is unconstitutional and void. It is attempted to show authority in the legislature to confer upon the governor the power of appointment in the following clause of the constitution: "In all cases not otherwise provided for in this constitution, the legislature may determine the mode of filling all vacancies in all offices." Art. XII., sec 7. But this clause does not confer the power.

The office of chancery clerk of Tate county had no existence until the creation of that county, and then it became the right of the people to fill it by election. The office was not "vacant" in the legal significance of the term. Searg. Const. Law, 373, 374. The power to fill a vacancy does not give the right to fill a newly created office. People ex rel. Ewing v. Forquer, Breese (1 Illa.), 68; 6 Eng. (Ark.), 152; 2 N. H., 202. If there was a vacancy in the office of chancery clerk, it was "a vacancy in a county office," which shall be filled by an election to be ordered by the board of supervisors. Const., art. VI., sec. 20; ib., art. VI., sec. 19.

2. But if the law authorizing the governor to appoint be held valid, defendant's appointment to the office was void, because he was a member of the legislature by which the county of Tate was created, and by which was also created the office of chancery clerk in that county. "No senator or representative during the term for which he was elected shall be appointed to any office of profit under this state, which shall have been created or the emoluments of which have been increased during the time such senator or representative was in office, except to such offices as may be filled by an election of the people." Const., art. IV., sec. 38; Shelby v. Alcorn, 36 Miss., 273.

3. But if it should be held that the appointment of the defendant is valid, then we insist it is void as obnoxious to section 38 of article four, which declares "that no legislator shall be appointed to any office, the emoluments of which have been increased during the term such senator or representative was in office," etc. It is admitted that the defendant was a member of the legislature that created Tate county, and that the emoluments of



---

Brief for appellee.

---

chancery clerks were increased by the same legislature. It makes no difference that he resigned before the bill was signed by the governor. He was a member at the time the law increasing the emoluments of the office passed both houses.

4. But it said that the law fixing the fees and emoluments of chancery clerks was never a law, and that therefore the fees and emoluments were never increased, because the enrolled bill had been altered and mutilated. The fact that the enrolled bill contained a pencil memorandum that the committee on enrolled bills had stated that it had been altered, and requested permission to correct it, is no proof that the bill had been mutilated. It is the law of the land, as it appears in the records of the office of the secretary of state, and no one can gainsay it. Enrolled bills import absolute verity, and cannot be questioned even by reference to the journals of the legislature, much less by parol proof. *Green v. Weller*, 32 Miss., 650.

*Harris & George*, for defendant in error.

1. That when a new county is created, and by the act creating it, it is to be organized before the next succeeding general election, the county officers necessary and required under the constitution are then called into being, and until they are filled, the offices, in the sense of the constitution, are vacant. See art. V., sec. 13; art. VI., sec. 20.

2. That when a county office is vacant, and it is to be filled by an election, such election can be ordered only by the board of supervisors of the county.

3. That the constitutional power—not to say duty (art. iv., sec. 37)—of the legislature “to provide for the organization of new counties,” includes within it the further power to do all that is necessary and proper to complete the organization, and as there can be no complete organization of a county without a provision for the necessary constitutional offices, the legislature may provide for filling such offices as they deem fit, not contrary to the constitution. It was the manifest intention of the framers of the

---

Brief for appellee.

---

constitution that all vacancies should be filled, with two exceptions, in the manner to be designated by the legislature. The constitution no where intimates that such vacancies shall be filled by an election.

Upon the creation of Tate county, every office, brought by the act into existence, was *vacant* in the broadest sense of the term. How was the vacancy to be filled except as the constitution directs, in such manner as the legislature might prescribe. The legislature directed that the vacancies should be filled by appointment by the governor. Then if West's appointment was void for other reasons, still the vacancy could only be filled in the mode which the legislature had prescribed, *i. e.*, by appointment by the governor or on a certain contingency by the chancellor.

Then, whatever may be the defendant's rights, it is clear that the relator has no right to question it. But the relator's right is also gone upon another ground. Supposing the appointment of West was void and the office was vacant, and that the election of relator was valid, his term of office began immediately on his election, and he wholly failed to qualify within thirty days thereafter.

2. The act creating Tate county did not *ipse facto* create the office of chancery clerk. The constitution fixes the different offices for a county the moment it is created, and the office owes its existence to the constitution and not to the act creating the county.

As to the ground, ineligibility, arising from the increase of the emoluments of the office, it is sufficient to say that the fee and salary bill, conceding for the present that it ripened into a valid law, did not do so until the 23d of October, 1873, when the governor approved it. The fees and emoluments of the office were not increased until that date, when the defendant was not a member of the legislature, for he resigned in the preceding April.

3. The unconstitutional act, relative to the election of chancery clerk, is absolutely void, and cannot be valid in its application to the present case. The court cannot make a new statute out of

---

Brief for appellee.

---

the constitutional parts. The whole statute must be void unless the constitutional parts can have effect in the sense the legislature intended and independent of the unconstitutional part. If the statute has two distinct objects independent of each other, and be void as to one, the other may have effect because of the legislative intent as to what may be carried out; but if it have but one object, and some of its provisions are void, then the whole is void, and this for no other reason than that the object could not be obtained in the sense intended by the legislature. Cooley Const. Limit, 178 et seq.

The whole object and intent of the statute was to change the general election for clerks and district attorneys from 1871, and quadrennially thereafter to 1873, and quadriennially thereafter. Its whole basis and scheme is unconstitutional and has been so decided. See *Thompson v. Grand Gulf Bank*, 3 How., 240.

*W. L. Nugent*, on the same side:

The court may inspect the original bills in the office of the secretary of state, and have recourse to the legislative journals to ascertain the validity of what are published as laws of the state. *Supervisors v. Heeran*, 2 Minn., 330; *Jones v. Hutchinson*, 43 Ala., 721; *Spangler v. Jacoby*, 14 Ills., 297; *Fowler v. Pierce*, 2 Cal., 165; 17 Ills., 151; 19 ib., 324. A bill does not become a law until it has gone through all the forms made necessary by the constitution to give it force and validity. *Wartman v. Philadelphia*, 33 Penn. St., 202; *Jones v. Hutchinson*, *supra*. An act approved by the governor under a mistake, and subsequently returned to the legislature with his signature erased and his objections stated, was not a law, the bill never having gone absolutely out of his possession, and the legislature having been promptly notified of the facts. *People v. Hatch*, 19 Ills., 283; *Birdsall v. Carrick*, 3 Nev., 154. The signatures of the speaker of the house of representatives and president of the senate are presumptive evidence only of the passage of an act (*Turley v. County of Logan*, 17 Ills., 151), and evidence *aliunde* may be

---

Opinion of the court.

---

received to contradict the presumption. *Fowler v. Pierce*, *supra* ; *Green v. Weller*, 32 Miss., 650. HARDY, J. It is essential to the validity of a law that it be laid before the governor personally after it has been passed in a legal and constitutional form, the governor being part of the law making power by the express terms of the constitution. 99 Mass., 636.

But there is another potent objection against the law. The legislature adjourned before any action was taken by the governor; and he did not approve the bill until three days after the assembling of the next session of the legislature in October, 1873. By the very terms of the constitution he could not approve the bill at all. If it is a law at all, it has become so by force of the constitution itself, and not by anything which the governor has done or failed to do. It can only be a law by virtue of its passage by the legislature, and the proof shows it is not the bill which was enacted.

There is another view equally potent. The legislature requested the return of the bill, though the enrolling committee and the governor assented. In contemplation of law, therefore, the bill has never passed out of the possession of the legislature, and the governor was powerless to approve it. The process of correction was simple — to return the erroneously enrolled bill to the legislature for appropriate action.

PEYTON, C. J., delivered the opinion of the court.

This is a writ of error from a judgment dismissing an information in the nature of a *quo warranto* filed by the district attorney on the relation of J. P. McCracken against Osborne F. West.

By an act of the legislature of this state, approved April 15, 1873, a new county called the county of Tate was created, and under the authority of an act amendatory of that act, approved April 19, 1873, the defendant in error was appointed by the governor chancery clerk of said county, to hold, possess and enjoy

---

Opinion of the court.

---

said office of chancery clerk until the first Monday in January, 1876, and by virtue of said appointment, he duly qualified and entered upon the discharge of the duties of the office.

The relator, J. P. McCracken, claims to be entitled to the office of clerk of the chancery court of said county of Tate by virtue of his election to that office by the qualified voters of said county, at an election held on the first Tuesday after the first Monday in November, 1873, under an act to provide for the election of district attorneys and clerks of the circuit and chancery courts of this state, approved April 21, 1873.

The questions presented by this case for our determination are of no ordinary character, and have received in their solution that mature and deliberate consideration to which their gravity and importance entitle them.

It is urged on behalf of the relator, that the appointment of the defendant to the office of clerk of the chancery court of Tate county is void, for the following reasons: 1. Because the act under which he was appointed was unconstitutional and void. 2. Because he was a member of the legislature at the time of the creation of the office of clerk of the chancery court of said county of Tate. 3. Because the emoluments of that office were increased during the time he was a member of the legislature.

In support of the first objection to the appointment of the defendant to the office of clerk of the chancery court of Tate county by the governor, it is contended that no vacancy in any county office, after the first general election under the present constitution, can be filled except by an election by the qualified electors of the county, ordered by the board of supervisors of the county, as provided in section 20 of article 6 of the constitution, and that the act of the legislature conferring the power on the governor to make the appointment of chancery clerk of said county was unauthorized by the constitution, and is therefore null and void. This provision of the constitution has reference to filling vacancies that have occurred by death, resignation or removal after all the

---

Opinion of the court.

---

offices in the county have once been filled by an election. This is true with reference to a county that has once been fully organized. But it does not apply to the organization of a new county, which presents a special case, arising under the power conferred upon the legislature by section 37 of article 4 of the constitution, to organize new counties. This power to organize a new county and put the machinery of the local government in operation might, upon a fair and reasonable construction, be regarded as sufficient to uphold the act conferring the power on the governor to make the appointment. Even if this provision should not confer the power, there can be no doubt that section 13 of article 5 of the constitution does give the legislature authority to pass the act under consideration. This section provides that all vacancies not provided for in this constitution, shall be filled in such manner as the legislature may prescribe. Under these two sections of the constitution, there can be no reasonable doubt as to the power of the legislature to confer upon the governor the authority to appoint a chancery clerk for the newly created county, to continue in the office until the first Monday in January, 1876, when the office will be filled by an election in November, 1875, and quadrennially thereafter. But it is insisted that the act authorizing the appointment was repealed by an act entitled "an act to provide for the election of district attorneys and clerks of the circuit and chancery courts in this state," approved April 21, 1873. With regard to this act, it is sufficient to say that it has recently been declared by this court, to be unconstitutional and void, in the case of *Wolfe v. Peyton*.

It is admitted by both parties that the defendant was a member of the legislature at the time of the passage of the act, creating the county of Tate, and also at the date of the passage of the supplementary act, under which he was appointed clerk of the chancery court of said county, and that he resigned his office of representative on the 19th day of April, 1873, and was appointed by the governor clerk of the chancery court of said county on

---

Opinion of the court.

---

the 21st day of April, 1873, and that the relator was elected to that office on the first Tuesday after the first Monday in November, 1873.

This admission brings us to the consideration of the second ground of objection to the validity of the defendant's appointment, which involves a solution of the question, whether the act forming the county of Tate created the office of the clerk of the chancery court of that county.

It is insisted on the part of the defendant that said act did not create the office, but that it was created by the constitution of the state. Upon reference to the constitution, we find the 19th section of article 6 provides that the clerk of the supreme court shall be appointed by said court for the term of four years, and the clerk of the circuit court and the clerk of the chancery court shall be elected by the qualified voters of their several counties, and shall hold their office for the term of four years. This does not create the office, but pre-supposes the office to exist, and prescribes the manner in which it is to be filled in counties fully organized. The office of clerk of the chancery court is a county office, and, in the nature of things, it cannot exist until the county exists. It springs into existence upon the creation of the county and the extension of the chancery system to it. It cannot be said, with any propriety of language, that the *office of clerk of the chancery court of Tate county* existed before that county was created, and before it had a chancery court, and the act which created the county gave it a chancery court.

If this be a correct view of the law, it follows that the defendant, under the 38th section of the 4th article of the constitution, was, at the time of his appointment, incapacitated to hold the office of clerk of the chancery court of Tate county by *appointment by the governor*, but is now eligible to said office either by an *election of the people*, or by appointment by the governor. This is a wise provision of the constitution, designed as far as possible to preserve the purity of legislation, by putting the sting of disabil-

---

Opinion of the court.

---

ity into the temptation of members of the legislature to create offices of profit with the view of taking and holding them themselves.

This brings us to the consideration of the question, whether the emoluments of the office of clerk of the chancery court of Tate county were increased during the time the defendant was a member of the legislature, and the solution of this question necessarily involves an inquiry into the validity of an act of the legislature of this state, entitled "an act to regulate the fees and salaries of public officers," approved, October 22, 1873.

It is very evident from an inspection of the enrolled bill, as signed by the governor and deposited in the office of secretary of state, that it was not the bill passed by the legislature. This is apparent from the erasures, interlineations and omissions contained in said enrolled bill. Additional evidence is derived from the journals of two houses of the legislature, which clearly show that it was not the bill passed by the legislature. The senate journals show that amendments were made to the bill on its final reading, which are not contained in the enrolled bill, which was sent to the governor for his action thereon.

A special committee, appointed by the senate, to inquire into the mutilation (as they call it) of the fee and salary bill, reported that a bill of that title was passed by the legislature at the regular term held in January, 1873, and passed into the hands of the enrolling clerk, but was never correctly enrolled. And after it was incorrectly enrolled it was handed to the committee of the senate on enrolled bills, and was, by the committee, who acted under the belief that the bill had been correctly enrolled and under a mistake of fact, handed to the governor for his approval. Immediately after such presentation for approval, and on the last day of the session, the committee on enrolled bills discovered the gross mistakes and inaccuracies in the bill as enrolled, and immediately notified the governor that the bill so handed to him was not the bill in fact passed by the legislature, and asked and obtained leave



---

Opinion of the court.

---

to examine it and correct the many errors contained in it. If it was made to appear that it was incorrectly enrolled, the committee had a right to recall it at any time before it was acted on by the governor, and correct it, and, under such circumstances it is believed, the signature of the governor would not make it a law. The enrolled bill and the act, as published, bear internal evidence that it never could have been passed by the legislature. That portion of the act purporting to prescribe the fees of certain officers is unintelligible, as using figures without anything to indicate what value they represent.

When the governor was informed by the committee of the many errors in the enrolled bill, and had granted their request to examine and correct those errors, so as to make the enrolled bill conform to the bill as it was passed by the legislature, the enrolled bill was, in legal effect, withdrawn from the governor, and became under the control of the senate for the purposes indicated, which could not be effectuated on account of the immediate adjournment of the legislature. The right of the governor, under this state of facts, to sign the bill, is more than doubtful.

The doctrine that the enrolled acts of the legislature, when signed by the speaker of the house of representatives and president of the senate, and approved by the governor, and deposited in the office of the secretary of state, are records, and import absolute and uncontrollable verity, and that they are conclusive evidence of the due enactment of the statutes contained in them, and cannot be impeached in any manner, as enunciated by a majority of the court in *Green v. Weller*, 32 Miss., 650, must be received with some qualification. We think these acts are *prima facie* evidence of the existence of the statutes, and that they were regularly and constitutionally passed by the legislature, but they are not conclusive.

Mr. Justice Cooley in his valuable work on Constitutional Limitations says: "Each house keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to

---

Opinion of the court.

---

take judicial notice. If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirements of the constitution, or that in any other respect the act was not constitutionally adopted. The courts may act upon this evidence, and adjudge the statute void." Cooley on Constitutional Limitations, 135.

The constitution requires each house to keep a journal, and declares that certain facts, made essential to the passage of the legislative act, shall be stated therein. If those facts do not appear on the journal, the conclusion is that they did not transpire. The journal of each house is made up under the immediate direction and inspection of the house, and is presumed to contain a full and complete history of its proceedings, and is the proper evidence of the action of that branch, upon all matters before it. 1 Greenl. Ev., section 491, page 538. It is clearly competent to show from the journals of either branch of the legislature, that a particular act was not passed in the mode prescribed by constitution, and thus defeat its operation altogether. If a certain act received the constitutional assent of the body, it will appear on the face of the journal. And when a contest arises as to whether the act was thus passed, the journal may be appealed to to settle it. It is the evidence of the action of the house, and by it, the act must stand or fall. It certainly was not the intention of the framers of the constitution that the signatures of the presiding officers of the two houses, and of the executive, should furnish conclusive evidence of the passage of an act. The presumption indeed is that an act thus verified, became a law pursuant to the requirements of the constitution, but that presumption may be overthrown. If the journal is lost or destroyed, this presumption will sustain the act, for it will be contended that the proper entry was made in the journal. *Spangler v. Jacoby*, 14 Ill., 299; *Prescott v. Board of Trustees of Illinois and Michigan Canal*, 19 Ill., 327; and *Fowler v. Pierce*, 2 Cal., 165.

An act of the legislature is passed and becomes a law, only

---

Opinion of the court.

---

when it has gone through all the forms made necessary by the constitution to give force and validity to it as a binding rule of conduct for the citizen. *Jones v. Hutchinson*, 43 Ala., 721.

The wise rules adopted as safeguards against error in the business of legislation are ordinarily sufficient to secure the object; but notwithstanding the utmost vigilance, error will sometimes intervene. In making the copy of an engrossed bill for enrollment, a separate and distinct matter from that contained in the original bill might be inserted and escape detection before the adjournment of the legislature. In such case great injury might result to the public, and the rights of the citizen, if resort for the detection of the error, could not be had to the legislative journals. Why should not the citizen, whose life, liberty or property is made forfeit by the operation of a particular act, be allowed to show to the court that the same was passed in violation of his constitutional rights, or that it has been placed among the archives of government by fraud or mistake, and never had a legal existence? Is there no way of ascertaining whether the bill deposited in the office of the secretary of state is the bill actually passed by the legislature? We think this may be done by the evidence furnished by the journals of the two houses of the legislature. The errors must appear upon the face of the enrolled bill, or from the journals of the legislature, to justify the court in pronouncing the act void. Whenever the legislature is acting in the apparent performance of legal functions, every reasonable presumption is to be made in favor of the action of that body; it will not be presumed in any case, from the mere silence of the journals, that either house has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, unless where the constitution has expressly required the journals to show the action taken, as, for instance, where it requires the yeas and nays to be entered. *Cooley on Constitutional Limitations*, 135.

We have arrived at the conclusion that the act under which the defendant, West, was appointed clerk of the chancery court of

---

Syllabus.

---

Tate county, is valid, and that West, being a member of the legislature at the time that that office was created, was thereby rendered incapable of holding said office by the appointment by governor; that the election of the relator, McCracken, in November last, to the office of clerk of the chancery court of said county of Tate, was illegal and void, and that said office now remains to be filled by executive appointment. And that the act entitled "an act to regulate the fees and salaries of public officers" is void.

The judgment dismissing the information in the nature of a *quo warranto* is affirmed.

Per TARBELL, J. Since the judgment of this court in the above cause, I have reviewed the record therein. Without intending to dissent, I am nevertheless impressed with the conviction that when we had passed upon the claim of McCracken to the office in controversy, the case was closed. If he was without right, could he call in question the right of West? If not, ought this court to pass upon it? Concurring in the conclusion that the claim of McCracken was without merit, my opinion is reserved upon the other points discussed and decided.

---

JAMES MCBETH v. THE STATE.

1. CRIMINAL LAW — INDICTMENT — MISNOMER. — Where the person upon whom the felony is committed is misnamed in the indictment, and this should be shown in evidence on the trial, for such variance the defendant should be acquitted. 1 Amer. Crim. Law (Wharton), § 257. If the name in the indictment, however, be that by which the person is generally known, though different from the true name, the conviction will be good in a capital case. *Meger v. The State*, 42 Miss. Rep., 642.
2. SAME — ERRONEOUS INSTRUCTIONS — CASE IN JUDGMENT. — The court instructed the jury, that "It is incumbent on the defendant to show clearly that the illtreatment to which the deceased was subjected was *alone* the cause of the death, and if the wound given was dangerous, then the defendant could not shelter himself under the plea of erroneous

---

Briefs.

---

treatment;" *held*, that this charge did not propound the law correctly, that it was too broad in affirming that the defendant must show that ill-treatment was *alone* the cause of the death, and that the last clause did not neutralize the error in the first, and in view of the testimony, may have misled the jury. Arch. Crim. Prac. & Plead., page 261 and notes.

ERROR to the Circuit Court of Capiah County. Hon. URIAH MILLSAPS, Judge.

The opinion of the court contains a sufficient statement of the case.

*C. E. Hooker*, for plaintiff in error :

The rule as to the designation of the parties injured is much more rigid and inflexible than that with regard to the name and addition of defendant. A variance or an omission in the name of the person aggrieved, is much more serious than a mistake or addition of the defendant, as the latter can only be taken advantage of by plea in abatement, while the former will be ground for arresting the judgment, when the error appears on the record, or for acquittal when the variance occurs on the trial. Wharton Am. Cr. Law, 71, 72 and 641; *United States v. Howard*, 3 Sumn., 12.

The court instructed the jury for the state, that "It is incumbent on the defendant to show clearly that the ill treatment to which the deceased was subjected, was alone the cause of death ; and if the wound was dangerous, then the defendant cannot shelter himself under the plea of erroneous treatment." This instruction did not propound the law correctly. It tended to mislead the jury and was too broad in its terms.

*Geo. E. Harris*, Attorney General :

A new trial will not be granted by this court merely because the verdict is contrary to the preponderance of evidence, there being positive evidence upholding it. *Lea v. Guice*, 13 S. & M., 656. The question in such cases is not, is the verdict clearly right? but is it manifestly wrong? *Waul v. Kirkman*, 13 S. & M., 599; *Drake v. Surget*, 36 Miss, 458. The test is, is there suf-

---

Opinion of the court.

---

ficient evidence to support it. *Guion v. Doherty*, 43 Miss., 538. To authorize this court to set aside a verdict which the court below refused to disturb, the error must be clear; every presumption must be indulged in favor of the verdict. *Peck v. Thompson*, 23 Miss., 367; 1 Eng. (Ark.), 86; 12 Ga., 229; *Hilliard, N T.*, 340.

2. It is a well established rule in relation to instructions, that all must be construed together; and if, when so construed, the law be correctly expounded, the judgment will not be reversed because one instruction taken by itself is too broad. *Mask v. The State*, 36 Miss., 77; *Evans v. The State*, 44 Miss., 762. The following instruction was given for the defendant: "If the jury believe from the evidence \* \* \* that the wound inflicted was not necessarily mortal, but became so on account of the inexperienced and improper treatment of an unprofessional and unskilled person, and that such treatment alone caused death, they should acquit." Taking these two instructions together, the jury could not have been misled; and hence, it was no ground for a new trial. *Childress v. Ford*, 10 S. & M., 25; *Head v. The State*, 44 Miss., 731; 31 ib., 350. Nor will a new trial be granted on the ground of erroneous instructions if they did not influence the jury in their verdict.

SIMRALL, J., delivered the opinion of the court:

The plaintiff in error was indicted for the murder of one William Brusher, found guilty of manslaughter and sentenced to the penitentiary.

Two errors are relied upon in this court, for reversal of the judgment.

First, overruling the motion in arrest of judgment, because the person slain was named Bill Williams and not William Brusher. The motion in arrest of judgment must be founded upon some reason or ground which appears on the face of the record. It propounds the proposition of the law to the court, that not-

---

Opinion of the court.

---

withstanding the verdict, the sentence of the law cannot be pronounced upon it, because upon the whole record, such judgment would be improper. The cause assigned in this motion, the misnomer or misdescription of the person slain, did not appear upon the record. It was shown in the evidence.

For wise reasons, the law requires that the name of the person upon whom the felony was committed, or who was injured thereby, should be correctly given in the indictment; and if it shall be shown in evidence on the trial, that the person is misnamed in the indictment, or bears, and is known by a different name from that stated in the indictment, for such variance the defendant should be acquitted. 1 Easts. P. C., 514; 1 Chit. Crim. Law., 216; 1 Amer. Crim. Law (Wharton), § 257. If the name in the indictment be that by which the person is generally known, though variant from the true name, the conviction will be good in a capital case. State v. Gardner Wright, Ohio Rep., 392; 1 Amer. Crim. Law, § 257. See also Ungus' Case, 42 Miss. Rep., 642.

The observance of this rule is necessary, in order that the record of the trial may furnish evidence to protect the defendant against future prosecutions for the same offense.

It was proved on the trial that the person killed by the plaintiff in error, was named Bill Williams, and not William Brusher, as stated in the indictment. There was no counter evidence that he was known and called as well by the former as the latter name. The verdict on this point was in opposition to the evidence and the instruction of the court.

Counsel for the plaintiff in error insists, especially, that the 8th instruction given for the state is erroneous. It is:

"It is incumbent on the defendant to show clearly that the ill treatment to which the deceased was subjected, was *alone* the cause of the death. And if the wound given was dangerous, then the defendant can not shelter himself under the plea of erroneous treatment."

---

Opinion of the court.

---

We think that this charge does not propound the law correctly, and in view of the testimony, may have misled the jury.

The allegation in the indictment is, that the defendant killed and murdered the deceased. To constitute the crime either of murder or manslaughter, it must be proved that the wounds inflicted by the defendant produced death. The testimony of the medical attendant, Dr. Burnly, was, that death ensued about sixty hours after the wound had been inflicted, from inflammation, as he supposed, in the stomach. The deceased had been cut in the abdomen with an ordinary pocket knife, so that his entrails protruded. The bowels had been replaced, and the outer wound sewed up with a speying needle and flax thread, by one Patrick, shortly after the injury was inflicted. Within a few hours after this the deceased was removed to Dr. B.'s house, who visited him from time to time until his death. The doctor thought that the parts were drawn together too closely, which might have the effect of retarding suppuration and promoting inflammation. Proper medical treatment would have been, to have examined the bowels, dressed any internal wound, then to have replaced the viscera in its natural position in the abdomen, and drawn together and sewed up, but not tightly, the outer wound. It was wrong, also, to have administered chloroform, as was done by Patrick. Dr. Burnly did not rectify the bad surgery of Patrick, because, as one must suppose, the patient could not have been benefited thereby. In his examination in chief, he said that death was caused by the wounds. Speaking more in detail, he said that wounds in the abdomen are dangerous, but not necessarily fatal. He never examined, and therefore did not know whether the stomach or bowels had been cut or not.

If there be misgovernment on the part of the medical attendant, from ignorance, or inattention, this would form no exculpation, if the wound was mortal. Arch. Crim. Prac. & Plead., 282. But if the wound were merely dangerous, and the bad treatment the proximate and immediate cause of the death, the result



---

Syllabus.

---

would be different. If in this case death ensued from inflammation of the stomach or bowels — and the inflammation was the effect of the wound; was produced by it — then in law, death was produced by the wounds.

It is a question of fact for the jury, under all the circumstances, whether death ensued from the injuries inflicted by the defendant.

The instruction was too broad in affirming that the defendant must show that the ill treatment was *alone* the cause of the death. The last clause of the charge does not neutralize the error in the first.

If a person injured must die from the effects — but there is a chance of life by the performance of a surgical operation, but death immediately follows the operation — here the inflictor of the injury would be criminally responsible as causing the death. Arch. Crim. Prac. & Plead., 261, et sequiter and notes.

For these errors the judgment is reversed and venire de novo awarded.

---

WASH DAVIS v. THE STATE.

1. LARCENY — PRESUMPTION ARISING FROM RECENT POSSESSION OF STOLEN GOODS. — No definite length of time, after loss of goods and before possession shown in the accused, seems to be settled, as raising a presumption of guilt. Where the goods are bulky or inconvenient of transmission, or unlikely to be transferred, it seems that a greater lapse of time is allowed to raise the presumption than where they are light or easily passed from hand to hand, and likely to be passed, because in the one case, the goods may not have passed through many hands, and the proof to justify the possession may, therefore, be more simple and easy; but in the latter case, the goods may, very probably, have come to the accused through many persons, and their transit, from the smallness of their nature and value, be much more difficult to be proved. Roscoe Cr. Ev., 18; 3 Greenleaf Ev., § 32.
2. PRESUMPTION — STRONG OR WEAK, ACCORDING TO THE FACTS AND CIRCUMSTANCES, AND THE LAPSE OF TIME. — The possession must be re-

---

Syllabus.

---

cent after the loss, in order to impute guilt; and this presumption is founded on the manifest reason that, where goods have been taken from one person, and are quickly thereafter found in the possession of another, there is a strong probability that they were taken by the latter. This probability is stronger or weaker in proportion to the period intervening between the taking and the finding, or it may be entirely removed by the lapse of such time, as to render it not improbable that the goods may have been taken by another and passed to the accused, and thus wholly destroy the presumption.

3. **SAME — SATISFACTORY ACCOUNT OF POSSESSION.** — The general rule is undoubtedly well settled, that the possession by a party, of stolen goods, shortly after their loss by the owner, is presumptive evidence of guilt, which, however, may be explained, and if the party in whose possession they are found fails satisfactorily to account for his possession, the presumption of guilt arises from the recent loss by taking, and the possession will stand and warrant a conviction; what will be sufficient to account for the possession, or to remove the presumption which may arise therefrom, will depend much upon the length of time which intervenes between the loss by the owner and the discovery of possession in the party charged, the nature and character of the goods, and all the circumstances of the case, and this, for the most part, is to be determined by the jury.
4. **SAME — REASONABLE ACCOUNT OF POSSESSION.** — Where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, it is incumbent on the prosecution to show that the account is false, but if the account given by him be unreasonable or improbable on its face, the *onus* of proving its truth lies on him. *Regina v. Crowhurst*, 1 C. & R. (47 Eng. C. Law R.), 370. The reasonableness of his account must necessarily depend, in a great measure, upon his deportment in relation to the article found in his possession, and upon the time and circumstances under which it is found.
5. **SAME — INSTRUCTIONS — CASE IN JUDGMENT.** — Phillips, a merchant in Macon, lost by a larceny, in January, goods to about the amount of \$1,000. Eleven months thereafter, goods bearing the trade mark of P. and in general description like the goods stolen, to the value of about \$140, were found in the possession of the accused; *held*, that it was error to instruct the jury "that if the jury believe, from the evidence, that goods as described were stolen in January and discovered in the manner as described eleven months thereafter, the time would not be unreasonable." This qualification of defendant's instructions in connection with those given for the prosecution, left no other alternative, logically, than a verdict of

---

Brief for plaintiff.

---

guilty; *held further*, that this was virtually an instruction upon the merits, and whether "the time would not be unreasonable," was, with all the facts and circumstances, for the jury.

ERROR to the Circuit of Noxubee County. Hon. J. A. ORR, Judge.

The facts in the case are fully stated in the opinion of the court and briefs of counsel.

The following are assigned for error:

1. Because the jury found contrary to the law and the evidence.
2. Because the court erred in giving the 2d and 3d charges asked for by the state.
3. Because the court erred in giving a qualification to defendant's charges.
4. Because the court erred in overruling defendant's charges.

*Dismeskes & Cooper*, for plaintiff in error.

The plaintiff in error assigns the following causes why the judgment of the circuit court of Noxubee county should be reversed:

First. That the jury found contrary to the law and the evidence, and in support of this position, the testimony clearly shows that there was no direct or positive testimony against the defendant in the court below, it was only circumstantial, and we hold, that, to authorize a verdict of guilty, it must satisfy the jury. The only evidence offered upon the part of the state to establish the larceny, was the testimony of one T. C. Phillips and B. F. Powers, but neither proves the fact, that the goods found were the identical goods lost by the prosecutor, on the 19th day of January, 1868, but only shows that similar goods were lost, and a much larger amount than found with plaintiff in error; hence we maintain that there is no legal evidence sufficient to sustain a verdict of guilty, and would cite your honors to *Algheri v. State*, 25 Miss., 584; 1 *Starkie on Evidence*, 572; *Wills on Cir. Ev.*, 61 and 62.

We further maintain that if there is *one link* wanting in the chain of facts and circumstances, that a verdict of guilty cannot be

---

Brief for appellee.

---

supported, and the mere fact that there were goods found in the possession of plaintiff in error, so long after the larceny was said to have been committed (as 11 months), that it is not sufficient of itself to connect plaintiff in error with the larceny. 3 Greenleaf on Evidence, §§ 32, 33 and 137; Jones v. State, 26 Miss., 247; Jones v. State, 30 id., 653; Roscoe's Cr. Ev., 18 and 19; 2 Russell on Crimes, 124. This charge we do not think propounded the law correctly to the jury, as it says that if the goods were found in the possession of Washington Davis, it is sufficient, and must find plaintiff in error guilty, totally ignoring the plain principle of law that the possession must be recent. Jones v. State, 26 Miss., 247, and authorities there cited.

In the third charge, the jury are instructed that when property recently stolen is found in the possession of a person, and he attempts to account for the possession, such an account must be satisfactory; this we hold to be error, as the law only requires him to give a reasonable account, and the onus then rests upon the prosecutor to show the account given is false. Jones v. State, 30 Miss., 655, and authorities there cited.

Fourth cause of error, we hold the court erred in giving the qualification to defendant's charges, which was given in the court below; it was a charge directly upon the evidence, and did away with the entire effect of defendant's 4th and 5th charges, as given by the court. The qualification states to the jury the fact that eleven months was not an unreasonable time; in other words, eleven months was recent. 3 Greenleaf on Ev., paragraph 32; 2 Russell on Crimes, 728 and note; Roscoe's Cr. Ev., 18; Jones v. State, 26 Miss., 247.

Fifth. We hold the court erred in overruling defendant's motion for a new trial. Wharton's Cr. Law, 3d ed., 994 and 1008; Hall v. Page, 4 Ga., 428.

*G. E. Harris*, Attorney General, for the state:

The defendant in the court below was indicted for larceny, and the larceny is established by the circumstance of finding the

---

Brief for appellee.

---

stolen goods in the possession of the accused. The witness, Phillips, was a merchant in the town of Macon, about the 15th of January, 1868; his store was broken open, and goods stolen therefrom to the amount of about one thousand dollars, consisting of domestics, linen, dress goods, hats, boots and shoes. That on the 9th of December thereafter, he saw defendant wearing a suit of clothes, which he (witness) thought was a portion of the stolen goods; asked defendant where he got the goods; he replied that he got them from the "New Orleans Cheap Cash Store," which is a store in Macon. Witness went to that store, found no such goods there; went to the "tailor's shop" in town, found some remnants of said goods, which he recognized as being the class of goods he lost eleven months ago. Witness further stated that the tailor informed him that "he had made a suit of clothes from that goods for Wash. Davis, the defendant." This, it seems, went to the jury without objections. Witness took a search warrant and a constable, and found in the house of accused domestic, linen, hats and shoes, and dress goods, which he recognized as his goods; some found in a chest, some in a trunk, and some between the mattresses of defendant's bed. The constable, F. B. Powers, corroborates the finding the goods, etc.

The defendant proved by Virginia Davis, that in May, 1868, she was at the house of defendant, and defendant bought goods from a peddler; some twenty dollars' worth, and she went home, left them still looking at the goods. Thinks there were some dresses for his wife and children, and hats, red muslin dress, ready made pants, etc. In rebuttal, Phillips says he lost no red muslin.

This is the whole case.

The first error assigned is that "the jury found contrary to law and evidence," and it is insisted that the circumstance of finding the goods in the possession of the defendant *eleven months* after the larceny is not sufficient to warrant the jury in finding the defendant guilty, and this I regard as being really the only question in this case. The court say, "no definite length of time after the

---

Opinion of the court.

---

loss of goods, and before possession shown in the accused, seems to be settled, as raising a presumption of guilt. When the goods are bulky, or inconvenient of transmission, or unlikely to be transferred, it seems that a greater lapse of time is allowed to raise the presumption, than when they are light and easily passed from hand to hand, and likely to be so passed." *Jones v. The State*, 26 Miss., p. 249; *Roscoe Crim. Ev.*, 18—, 3 *Greenl. Ev.*, sec. 32.

"The possession by a party of stolen goods, shortly after their loss by the owner, is presumptive evidence of guilt, which, however may be explained, and if the party in whose possession they are found, fails satisfactorily to account for his possession, the presumption of guilt arising from the recent loss and possession, will warrant a conviction." *Belote v. The State*, 36 Miss., 120.

But it is insisted that the court erred in qualifying defendant's charges, as follows: "If the jury believe from the evidence, that the goods as described were stolen in January, and discovered in the manner as described, eleven months thereafter, the time would not be unreasonable."

This instruction was not upon the facts of the case, but on the legal presumption, arising from the facts as stated, and I think the qualification was proper, and I see no error in the record, and ask that the judgment of the court below be affirmed.

TARBELL, J., delivered the opinion of the court:

The plaintiff in error was indicted, tried and convicted of the crime of larceny. The indictment charged goods stolen from the storehouse of Thos. C. Phillips of Macon. Several months after the loss, Mr. P. saw the accused in a suit of clothes made of goods resembling his stock. The accused said he bought the cloth or the suit at the "N. O. Cheap Cash Store" in Macon. Mr. P. testified on the trial, that he went to store named and there was no such goods there. He also testified, that he called at a tailor's shop in Macon, where he found scraps of cloth resembling goods lost or stolen from his store, and the tailor told him he had made

---

Opinion of the court.

---

a suit of clothes for Wash Davis of cloth from which the pieces found were cut. All this evidence, as detailed, was received without objection. Neither the tailor nor the proprietor of the "N. O. Cheap Cash Store" were introduced as witnesses. A witness for the accused testified that she was at the house of Davis when a man in a buggy drove up and sold Davis a quantity of shoes, hats, domestics, linen and clothing, such as were found and claimed as the property of Mr. Phillips. And this was all the testimony. Reduced to its legal limits, the facts are these: Mr. Phillips, a merchant in Macon, lost, by a larceny in January, goods to the amount of about \$1,000. Eleven months thereafter, goods bearing the trade-mark of Mr. P., and a general description like the goods stolen, to the value of \$140, were found in the possession of the accused.

The trial was conducted throughout upon the theory of a larceny or no larceny by the accused. No instruction was asked or given on either side, that the guilt of the accused should be established to the exclusion of all other reasonable hypotheses.

The first instruction for the prosecution directs the jury, that, if the accused was found in possession of the goods, feloniously taken from Mr. Phillips, and had failed to give a satisfactory account for such possession, they should find him guilty—the question of time and the idea that Davis might have been the receiver or purchaser of the goods in his possession, being pretermitted.

The second declares the rule, that "the possession of goods or property recently stolen is *prima facie* evidence that the possessor is the thief, and if he fails to account for such possession to the satisfaction of the jury, such presumption continues, and the jury are authorized to return a verdict of guilty."

The third instructed the jury that, "if the defendant, by his own confession, or the evidence of witnesses in his behalf, undertakes to account for his possession, it is for the jury to determine whether such account is consistent, honest or satisfactory, and

---

Opinion of the court.

---

they believe it is not, they are authorized to return a verdict of guilty."

The instructions for the accused were qualified, as follows: "That if the jury believe from the evidence that goods as described were stolen in January, and discovered in the manner as described, eleven months thereafter, the time would not be unreasonable."

As a whole, the instructions leave no discretion in the jury, and thus they lead to certain conviction. The first wholly omits the rule as to time as an element in the presumption of guilt arising from possession. The second correctly charges that the possession of goods or property "recently" stolen is *prima facie* evidence that the possessor is the thief—but, erroneously, that such presumption "continues." This, under the facts and circumstances detailed in evidence, is a question for the jury, after the lapse of considerable time between the larceny and the finding. The qualification of the instructions for the accused in connection with those given for the prosecution, left no other alternative, logically, than a verdict of guilty.

It is not far from correct, to say that on no subject are the decisions of the courts and comments of law writers, as various and unsettled as on the one involved herein. 2 Bish. Cr. Pr., § 696 et seq.; 2 Russ. on Cr., 123; 1 Ph. Ev., C. & H. & E.'s notes, 634, note 183; 1 Starkie on Ev., 23, 29, 30, 33, 34; 2 ib., 840; 3 ib., 1234–1253; 1 Am. Cr. L., § 728; 2 Arch. Cr. Pr. & Pl., 369, note [1]; Wills on Cr. Ev., 53; 1 Greenl. on Ev., § 34; *Algheri v. The State*, 25 Miss., 584; *Jones v. The State*, 26 ib., 247; *Sartorius v. The State*, 24 ib., 610; *Jones v. The State*, 30 ib., 653; *Belote v. The State*, 36 ib., 120; 19 Me., 398; 3 Brev., 514; 9 Ire., 140; *Warren v. The State*, 1 Iowa, 106; 2 Parker C. C., 586; 13 Grat., 757; 6 C. & P., 176; 1 Swan, 287; 9 Conn., 527; 7 Vt., 118; 15 Mo., 349; ib., 186; 8 Humph., 75; 8 Ind., 439; 3 Dev. & Bat., 122; 4 Jones (N. C.), 440; 12 Lew., 235; 2 Ind., 91; 12 Wis., 591; 14 Cal., 438; 4 Humph., 456; 1 Mass.,



---

Opinion of the court.

---

6; 9 Yerg., 408; 26 Ga., 350; 12 Ill., 259; 2 Ire., 402; 7 Rich., 497; 28 Ga., 254; etc.

The basis of all presumptions is the connection between facts and circumstances, as pointed out by experience. It is, however, one of the most important and arduous duties of the court to analyze the evidence and to propound the particular points to which the attention of the jury is to be directed. 1 Starkie on Ev., \*74.

Referring to the rule of presumption arising out of the possession of stolen property, Mr. Wills, in his treatise on Circumstantial Evidence, p. 62, says, "the rule must be applied with discrimination, for the bare possession of stolen property, though recent, uncorroborated by other evidence, is sometimes fallacious and dangerous as a criterion of guilt." With reference to the same rule, Lord HALE (2 Hale's P. C., 289), says "it must be very warily pressed."

In a very able note to Archbold's Cr. Pr. & Pl., vol. 2, p. 369, gleaned from the text-books, especially Russell on Crimes, it is said: "This rule, founded on the necessity of the case, which cannot admit offenses of this kind to go unpunished, wherever direct evidence is wanting of the guilt of the party, will probably seldom lead to a wrong conclusion if due attention be paid to the particular circumstances, by which such presumption may be weakened or entirely destroyed.

"Amongst the most prominent of these will be the length of time which elapsed between the loss of the property and the finding it in the possession of the prisoner." 2 Russ. on Cr., 123.

The authorities are uniform, that the force of this rule of presumption depends upon the recency of the possession as related to the crime, and that, if the interval of time is considerable, the presumption is much weakened, and more especially, if the goods are of such a nature as, in the ordinary course of things, frequently to change hands.

From the nature of the case, it is not possible to fix any precise period within which the effect of this rule can be limited; it must

---

Opinion of the court.

---

depend not only upon the mere lapse of time, but upon the nature of the property and the concomitant circumstances of each particular case. Wills, p. 55. In the creation of this presumption, the first element requiring attention, say the authorities, is that of time.

Lord HALE says, if the goods be found with the person the day of the theft being committed, this is a strong presumption; and yet, even in such a case, C., a very subtle horse thief, being pursued, procured B. to lead the horse, under pretense that he (C.) was pressed to go aside, thus escaping and leaving the presumption to fall on B., who was, though tried before a very learned and wary judge, condemned and executed. 2 Hale P. C., 289. It is agreed, therefore, that where reliance is placed on simple possession, the interval between the time of the taking and finding should be short. *Rex v. —*, 2 C. & P., 459; *Rex v. Adams*, 3 C. & P., 600.

It is also agreed, that as to light, portable articles, the force of the presumption diminishes as time elapses. *Jones v. The State*, 26 Miss., 247.

Where two pieces of woolen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner two months after being missed, and still in the same state, it was held that this was a possession sufficiently recent to call upon him to show how he came by the property. *Reg. v. Partridge*, 7 C. & P., 551.

Mr. Justice Bayley, in a case before him, directed an acquittal because the only evidence against the prisoner was, that the goods were found in his possession after a lapse of sixteen months from the time of their loss. Wills, 56. In *Rex v. Adams*, 3 C. & P., 600, the evidence against the prisoner charged with the larceny of a saw and mattock was, that the stolen articles were found in his possession three months after they were missed. It was held that this was not such a recent possession as *per se* to put him upon showing how he came by them.

---

Opinion of the court.

---

And when a stolen horse was found in the possession of the prisoner six months after it was lost, Mr. Justice Marsh held that it was no case to go to the jury. *Reg. v. Cooper*, 3 C. & K., 318.

Where three sheets were found upon the prisoner's bed, in his house, three months after they had been stolen, Mr. Justice Wightman held that the case must go to the jury, on the ground that it was impossible to lay down any rule as to the precise time which was too great to call upon the prisoner to account for the possession. *Rex v. Hewlett*, 2 Russ. on Cr.

And where seventy sheep were put upon a common in June, but not missed until November, and the prisoner was proved to have had the possession of four of them in October, and of nineteen more in November, the judge allowed evidence of the possession of both to be given. *Rex v. Dewhirst*, 2 Stark., 614.

Possession of the goods is always competent evidence, be the time longer or shorter; however insufficient it may be, *per se*, after a considerable lapse of time. In such a case, some circumstances additional to the possession are necessary to raise the presumption. 2 East P. C., 655; Russ. on Cr., 1154.

With reference to the question of time, Patterson, J., in *Rex v. Partridge*, 7 C. & P., 551, says: "I think the length of time is to be considered with reference to the nature of the articles stolen. If they are such as pass from hand to hand readily, two months would be a long time; but here that is not so; it is a question to the jury."

Starkie, vol. 3, p. 1243, says of this class of presumptions, they are "mixed," or composed of law and fact, and must be made by the jury and not by the court; and in vol. 2, p. 840, he says: "The rule is, that recent possession raises a reasonable presumption against the prisoner." See, also, 1 Am. Cr. L., § 728. Wharton says this presumption is one of fact and not of law. *Ib.*, § 729. The possession, however, to have this effect, must be recent, and must be unexplained. *Ib.*, § 728. If a party accused gives a reasonable account of his possession, the *onus* is then upon the prose-

---

Opinion of the court.

---

cution to show such a count to be false. Wills, 54, and other authorities herein. In the case at bar, there is no legal evidence falsifying the statements or the evidence of the accused. What Mr. Phillips was told by others cannot be taken into consideration and is not in the case.

Precisely how much the presumption is one of fact and how much of it is one of law, may not be quite plain as a matter of authority, though we have seen that, as a matter of legal principle, it is all of fact for the jury. 2 Bish. Cr. Pr., § 701.

Another material rule laid down by the text writers is, that the possession of stolen goods recently after the loss of them may be indicative either of the offense of larceny, or of receiving with guilty knowledge, according to the facts and circumstances. Wills, 61. And this leads to the remark that, upon the face of the record in the case at bar, the presumption of receiving is equally as strong as of a larceny by the accused.

This subject has been several times before our predecessors, and all the rules applicable to a case of this character have been distinctly stated.

Jones v. The State, 26 Miss., 247, was an indictment for the larceny of a saddle, in which case the felonious loss, and the possession of the accused, four or five months thereafter, were the only elements. It was held, that after such a lapse of time there was no presumption of guilt, without other evidence to establish the charge, and was not even sufficient to put the party on his defense.

Jones v. The State, 30 Miss., 653, was an indictment for the larceny of a knife. The knife was found in the possession of Jones about three weeks after its loss. It was held, upon two grounds, that the evidence was not sufficient to support the verdict. The reasons for this view of the case were these: 1. The deportment of the accused in connection with the charge and finding of the knife. 2. The reasonableness of his account how he came by the knife. He said he obtained it in North Alabama. The court say: "It is true, that the possession of goods recently stolen will

---

Opinion of the court.

---

create the presumption that such possessor is the thief. Yet this is a mere presumption, and the real state of the case may be entirely different, and yet the party be unable to show his innocence by any positive testimony. It is held that the person in whose possession the stolen goods are found, must account for his possession; yet, as from the nature of the goods and the circumstances of the case, this cannot always be done by legal evidence, it is held to be a matter of no little weight, that the conduct of the accused is consistent with the account given by him of the manner in which the goods came to his possession. *Roscoe Cr. Ev.*, 20; 2 *East. P. C.*, 665. As where he makes no attempt to conceal them, and on the contrary, openly exposes them, where they are subject to apprehension by the owner or others interested in them. These are circumstances tending strongly to destroy the presumption arising from recent possession, and they fully appear in the conduct of the accused in this case.

"It is also held, that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, it is incumbent on the prosecutor to show that the account is false; but if the account given by him be unreasonable or improbable on its face, the *onus* of proving its truth lies on him. *Regina v. Crowhurst*, 1 *C. & K.* (47 *Eng. C. Law R.*), 370. The reasonableness of his account must necessarily depend, in a great measure, upon his deportment in relation to the article found in his possession, and upon the time and circumstances under which it is found. If the article be small, and such as is easily and quickly transmissible from one person to another, and when it is found in the possession of the accused, it is openly exposed where the owner may readily find it, and will probably discover it, and he makes no effort to conceal it, but gives an account of his possession, which is probable from the nature of the article, these circumstances would be sufficient to destroy the presumption arising from mere possession, and to raise the presumption of innocence." As the record in the case at bar now stands, the account given by

---

Opinion of the court.

---

the accused of how he came by the possession of these goods is both probable and reasonable, and there is no legal evidence showing their falsity. For aught that appears, he may have purchased the clothes he had on, or the cloth from which they were made, at the "Cheap Cash Store," and the articles at his house, he may have purchased, as testified on the trial. What Mr. Phillips did or did not find at that store several months after the loss of his goods or what he was told then, are entitled to no consideration.

In *Jones v. The State*, 26 Miss., 247, the court say: "The evidence shows that the goods were not found in the possession of the accused until the lapse of five or six months after the taking; and the question here presented is, whether such possession, found after such a lapse of time, of itself raises a presumption in law of a felonious taking by the accused?"

"No definite length of time, after loss of goods and before possession shown in the accused, seems to be settled, as raising a presumption of guilt. When the goods are bulky or inconvenient of transmission, or unlikely to be transferred, it seems that a greater lapse of time is allowed to raise the presumption than when they are light and easily passed from hand to hand, and likely to be so passed; because, in the one case, the goods may not have passed through many hands, and the proof to justify the possession may, therefore, be more simple and easy; but in the latter case, the goods may, very probably, have come to the accused through many persons, and their transit, from the smallness of their nature and value, be much more difficult to be proved. *Roscoe Cr. Ev.*, 18; 3 *Greenl. Ev.*, § 32.

"Yet, all the cases hold that the possession must be recent after the loss, in order to impute guilt; and this presumption is founded on the manifest reason, that where goods have been taken from one person and are quickly thereafter found in the possession of another, there is a strong probability that they were taken by the latter. This probability is stronger or weaker in proportion to the period intervening between the taking and the finding; or it may

---

Opinion of the court.

---

be entirely removed by the lapse of such time as to render it not improbable that the goods may have been taken by another and passed to the accused, and thus wholly destroy the presumption.

"In prosecutions for larceny of chattels like that in this case, it has been well held, that after the lapse of such a period of time as in this case, the mere fact that the chattels were found in the possession of the accused, created no presumption of criminality; and that such possession, without other evidence of any kind to establish the charge, is not even sufficient to put the party on his defense." *Rex v. Adams*, 3 C. & P., 600; 3 Greenl. Ev., § 32; *State v. Williams*, 9 N. Car., 140. The soundness of the above rule, the court say, is recognized.

In *Belote v. The State*, 36 Miss., 96, which was an indictment for the larceny of bank bills, it is said: "The general rule is undoubtedly well settled, that the possession by a party of stolen goods, shortly after their loss by the owner, is presumptive evidence of guilt, which, however, may be explained; and if the party in whose possession they are found fails satisfactorily to account for his possession, the presumption of guilt arising from the recent loss by taking and the possession, will stand and warrant a conviction. What will be sufficient to account for the possession, or to remove the presumption which may arise therefrom, will depend much upon the length of time which intervened between the loss by the owner and the discovery of possession in the party charged, the nature and character of the goods, and all the circumstances of the case; and this, for the most part, is to be determined by the jury."

A view of the rule which, it is believed, ought to be declared in the case at bar, was indicated in the case just cited, viz: That the instructions in that case left it open for the jury to determine the question whether the time shown was short, under the circumstances; and under it, that question might have been fully argued to the jury. "If they were of opinion, from the circumstances — as it must be presumed they were — that the time of production

---

Opinion of the court.

---

of the money by the accused was sufficiently short, to raise the presumption of his guilt, and there was no explanation of his possession, the presumption of fact was not removed; and they were properly instructed that, in such case, they should find a verdict of conviction."

In the case at bar, if, instead of the instruction that eleven months was not an unreasonable lapse of time, that the jury should consider it as a case when the possession in the accused was shortly after the larceny, the court had submitted the proposition to the jury, whether, in view of the facts the accused was guilty, notwithstanding the great lapse of time, what is conceived to be the better rule in a case of this sort would have been observed, and in support of this view reference is made to the authorities cited herein.

That the weight of this presumption, after so great a lapse of time, should have been left to the jury, and whether, under the circumstances, this presumption continued for that length of time, it is believed, finds a somewhat conclusive illustration in these further material considerations:

1. A distinguished writer on the law of evidence, says: "It is always insufficient, where assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true; for it is the actual exclusion of every other hypothesis which invests mere circumstances with the force of truth. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be." 1 Starkie on Ev., 572.

2. It is certain that upon the record in this case, the presumption is quite as strong that the accused received these goods as stolen property, as, that he committed the larceny. 24 Miss., 610. Wills on Cir. Ev.

3. Manifestly, upon one state of facts, the presumption might



---

Opinion of the court.

---

arise that the accused committed the larceny, while under other circumstances, the presumption would be that of a felonious reception. *Satorious v. The State*, 24 Miss., 602.; *The People v. Teal*, 1 Wheeler's Cr. Ca., 199.

We have seen, that in *Jones v. The State*, 26 Miss., 247, under the circumstances therein, the goods having been found in the possession of the accused five or six months after the loss, it was held, that after such a lapse of time, such possession did not of itself raise a presumption in law of a felonious taking by him.

And in *Jones v. The State*, 30 Miss., 653, though the property was found in his possession within three weeks after its theft, and he was thus *prima facie* the thief, yet the presumption was negatived by his deportment, and the reasonableness of his account of his possession, which was not shown to be false.

The jury in the case under consideration were substantially instructed to consider it as though the property had been found in the possession of the accused shortly after the larceny. This, it is conceived, was in effect an instruction upon the weight of the testimony, and little less than the expression of an opinion by the court to the jury upon the evidence.

Upon the bare possession there was, after eleven months, no presumption of guilt, but, with all the facts and circumstances adduced by legal evidence, the whole case, including the lapse of time, ought to have been submitted to the jury without the qualification as to time.

The doctrine of some of the cases and text writers, that such a case, with all its facts, notwithstanding the lapse of time, is one for the jury, meets with approval. 2 Bish., § 697, 701.

Mr. Bishop, in his valuable work on Criminal Procedure, after a review of all that has been said on the subject under consideration, says: "All sorts of utterances are to be found in the books. But if we look at the question as one of principle, we shall see that in the nature of the case, evidences of possession, of declarations accompanying the possession, and the evidence of third

## Syllabus.

persons as shedding light respecting the truthfulness or falsity of such declarations, with dates and all other attendant facts, should be submitted to the consideration of the jury, and they should decide as a question of fact, not of law, whether the defendant is the guilty person or not."

Judgment reversed, cause remanded, and a new trial awarded.

## M. KAUFMAN v. JOSEPHINE WHITNEY.

1. **HUSBAND AND WIFE—SEPARATE PROPERTY.**—The husband and wife may occupy towards each other, distinct relations as respects property, and the husband may come under obligations of debt to the wife, as can a stranger. *Simmons v. Thomas*, 43 Miss. R., 31. Nor is it material whether the funds or property appropriated by the husband was with or without the wife's consent. He thereby becomes a creditor which a court of equity will recognize. *Wiley v. Gray*, 36 Miss. R., 510; *Thoms v. Thoms*, 45 Miss. R., 263.
2. **SAME—VALUABLE CONSIDERATION.**—A charge or mortgage of the wife's property, or a sale of it to exonerate the husband's estate, or to pay his debts, or the consumption of the wife's funds, constitute a valuable consideration to support a conveyance from the husband to the wife. Such conveyances when brought into question as fraudulent against creditors, should be tested by the same principles as a conveyance by a debtor to a stranger. *Vertner v. Humphries*, 14 Smed. & Mar., 130; *Roach v. Bennett*, 24 Miss. R., 355.
3. **SAME—ART. 23, CODE 1857.**—This statute does not embrace within its provisions conveyances from the husband to the wife, resting upon a valuable consideration. *Ratcliffe v. Dougherty*, 24 Miss. R., 181.
4. **SAME—GENERAL RULE.**—The general doctrine of the cases is, that a conveyance made by the husband to the wife directly, if supported by a valuable consideration and pure motives, will in equity be sustained as vesting the estate beneficially in the wife, and will prevail against a creditor.
5. **SAME—STATUTE OF LIMITATIONS.**—The 5th section of the act of 1867, continues the claim of the wife against the husband during the coverture and afterwards.
6. **SAME—EFFECT OF ART.**—CODE OF 1837, AND ACTS FEB'Y 5, 1867.—

50	103
178	767
50	103
83	605

---

Brief for appellant.

---

These statutory provisions provide a rule to protect a creditor and allow him satisfaction out of the property, although bought with the wife's money or effects; if the possession of the husband induced him to give the credit; also to protect a purchaser for value from the husband, without notice of the wife's equity.

APPEAL from the chancery court of Jefferson County. Hon. JAMES M. ELLIS, Chancellor.

The opinion of the court contains a sufficient statement of the case.

*William Sillers*, for appellant :

1. Insisted that the claims of the appellee did not come within the provisions of the act of February 19, 1867, in relation to married women. The act applies only to conversions subsequent to the passage of the act, and cannot affect prior acts of conversion and appropriation by the husband. 1 Black. Com., 46; Ledg. Stat., 190; Garrett v. Beaumont, 24 Miss., 379.

The bill is defective and totally insufficient, in not showing the precise dates of the receipts of the money. If the money was received before the date of the act, then neither the deed nor the bill can be sustained under the act of 1867. Appellee's rights accrue only upon conversions of her money or property after the passage of the act of 1867, and only then is preferred to debts and liabilities of the husband incurred after such conversion or appropriation.

2. The deed was not made with an honest intention, but to benefit Whitney. Having children by appellee, his deed to her converted him into a tenant by the courtesy, and he thereby secured to himself and wife the use of the property during her life, and a life estate in himself after her death. All this while he was insolvent. Code of 1857, p. 337, art. 28; 4 Kent. Com., 27, 28; Stanton v. Green, 34 Miss., 586; Hunt v. Knox, ib., 680, 681; Mangum v. Finacure, 38 ib., 354, 357; Simmons v. Thomas, 43 ib., 38. Appellee was not therefore an innocent or bona fide purchaser, she had full notice of appellant's claim. Pope v. Pope, 40 Miss., 517; Perkins v. Swank, 43 Miss., 358, 359.

---

Brief for appellee.

---

Appellee, buying some of the goods on credit, and having them charged to her husband, knowing the contract of appellant to supply her husband on credit, seeing the appellant selling the balance on credit to her husband, she and her husband consuming them without making known her claim, is equitably estopped from setting up her claim against appellant. *Nixon's heirs v. Carco's heirs*, 28 Miss., 431; *Hilliard et al v. Cagle et al.*, 46 Miss., 336-345; *Farmers' Bank Va. v. Douglass*, 11 S. & M., 469; *Maugum v. Finacune*, 38 Miss., 357; *Simmons v. Thomas*, 43 Miss., 38.

The bill rests the appellee's case and claim solely upon the act of 1867, whereas the chancellor decided the case solely upon the proposition that a husband, a debtor to his wife, on account of her separate property may prefer her absolutely as a creditor. *Wilie & Co. v. Gray*, 36 Miss., 513; *Allen v. Miles Adams & Co.*, ib., 640.

Upon the question of adequacy or inadequacy of consideration, there is a wide distinction between a fair, open, public, judicial, official fiduciary sale and a private conveyance made voluntarily without a sale, accounting or settlement. The relation of the parties to this deed is a question of great importance. *Price v. Martin*, 46 Miss., 500; *Stanton v. Green*, 34 Miss., 586; *Taylor v. Eckford*, 11 S. & M., 34.

Appellee's *allegata* and *probata* do not correspond. See *Pinson v. Williams*, 23 Miss., 64; *Bowman v. O'Reilley*, 31 Miss., 261; *Dunlap and Wife v. Hearn*, 37 Miss., 475; *Hanks v. Neal*, 44 Miss., 221.

*H. Cussedey*, for appellee :

A creditor may prefer creditors if he does it *bona fide*; and a husband may become the debtor of his wife and give her a preference in like manner as any other creditor. *Roach v. Bennett*, 24 Miss., 104; *Mangum v. Finacune*, 38 ib., 357; *Butterfield v. Stanton*, 44 ib., 19; *Wiley v. Gray*, 36 Miss., 510. The capacity of husband and wife after marriage to contract for a *bona fide* and valuable consideration for the transfer of property from the hus-

---

Opinion of the court.

---

band to a trustee for the benefit of the wife, or to her directly, is not now a subject open for discussion. *Wiley v. Gray, supra.*

The criterion by which the value of the land is to be judged is the actual debt due by the husband to the wife, instead of the price named in the deed, which was but an approximation to the real debt. *Simmons v. Thomas*, 43 Miss., 81.

If Kaufman seeks to bring his case within article 24 of the revised code of 1857, p. 335, then to obtain the benefit of this statute, he must bring himself fully and clearly within its terms, as it can apply only to the cases specifically described therein, and affirmatively brought within its provisions. It is not within the provisions of the statute, because, 1st. The husband did not purchase the property with the money of the wife; 2. The trust was not created as a matter of fact; 3. The credit was not given in consequence of the possession of this particular property. *Butterfield v. Stanton*, 44 Miss., 26, 27.

6. The statute of limitations of three years is set up to defeat the alternative relief prayed in the bill. This plea cannot prevail for several reasons: 1st. No statute of limitation runs against a married woman, for the *corpus* of her estate, so long as the disability of coverture exists; 2d. The statute of limitations confers a personal privilege, and could only have been set up by Whitney; 3d. The right of action of Mrs. Whitney became satisfied by her acceptance of the deed of her husband to the property in payment of the debt; 4th. If the three years provided by the act of February 19, 1867, is intended to be set up, it is replied that the act does not apply to the *corpus* of the estate of married women, only to the income of her separate estate. See sec. 6 of act, code of 1871, § 13.

SIMRALL, J., delivered the opinion of the court:

This contestation arises on these facts: February 25, 1869, J. J. Whitney conveyed to Josephine, his wife, the tract of land the subject of this suit, for the consideration of \$2,500; recited in the

---

Opinion of the court.

---

deed to have been seized by him as the separate property of his wife, but used for his own purposes. The conveyance was in liquidation and satisfaction of the indebtedness. This deed was filed for record on the day of its date.

M. Kaufman, the appellant, recovered a judgment the 22d of November, 1870, against J. J. Whitney for a thousand dollars; under his execution he caused this tract of land to be levied upon, and advertised for sale. Thereupon Mrs. Whitney brought this suit enjoining the sale, setting up ownership in herself, acquired as above stated. The bill has a double aspect, seeking alternate relief, grounded upon the second and third sections of the act of 19th of February, A. D. 1867, "to amend the law heretofore in force respecting the property rights of married women." If the court should decline to uphold the deed as resting title, then a claim is preferred for prior satisfaction out of the land, for so much of the funds and property of the wife as were converted and appropriated by the husband.

Kaufman assails the conveyance to Mrs. Whitney on several grounds, controverting her right to relief in any form, or to any extent.

From the legislation assuring to *femes covert* estates, and the incomes thereof, to their separate use and disposition, it follows that they may contract to a large degree, as if under no disability. They may loan money, among other things. This policy encroaches upon the rules of the common law, and very greatly circumscribes the marital rights of the husband. The husband and wife may occupy towards each other distinct relations as respects property, and the husband may come under obligations of debt to the wife, as can a stranger. *Simmons v. Thomas*, 43 Miss. Rep.; *Thoms v. Thoms*, 46 Miss. Nor is it material, where the funds and property of the wife have been appropriated by the husband, whether it was with, or without her consent, as in either event she would be entitled to reimbursement, on the footing that she thereby became a creditor, which relation a court of equity would recognize. *Wiley v. Grey*, 36 Miss. Rep., 510.

---

Opinion of the court.

---

If a duty or obligation rests upon a party, which a court of law or equity esteems valid, a voluntary performance will be upheld and sustained. If the husband could be compelled in a court of equity to compensate the wife for her funds, used by him, very surely a fair settlement and satisfaction made to her voluntarily, would be quite as meritorious as if obtained compulsorily. No objection can be suggested against a discharge of the claim of the wife, by a conveyance to her or for her use, which would not equally apply to a pecuniary payment; if indeed the transaction were characterized by pure motives, and the property were only a fair equivalent of the debt. Such settlements upon the wife have been sustained in this court in several cases. The wife thereby becomes a purchaser for value, and may hold against the creditors and subsequent purchasers from the husband. A charge or mortgage of the wife's property, or a sale of it, to exonerate the husband's estate, or to pay his debts, or the consumption of the wife's funds, constitute a valuable consideration to support a conveyance by him to her.

Such dealings (though to be carefully scrutinized on account of the temptation to give an unfair advantage to the wife over other creditors), must be tested by the same principles, as a conveyance by a debtor to a stranger, when brought into question as fraudulent against creditors. *Mangum v. Finland*, 38 Miss., 355; *Vestner v. Humphrey*, 14 S. and M., 130; *Roach v. Bennett*, 31 Miss., 93; *Wiley v. Grey*, (*supra*); *Stanton v. Butterfield*, 44 Miss., 15. That the husband, being insolvent, preferred the wife, is not, *per se*, an objection to the settlement. *Roach v. Bennett*, *ubi supra*; but such performance must be made in good faith, and not with a design to secure an advantage to himself; (cases above cited).

Is the conveyance from the husband to the wife of the character claimed in the bill? The defendant assails it as fraudulent, because there was nothing due from her husband to the complainant. Second, the supplemental answer affirms that the property is in value largely in excess of the debt.

---

Opinion of the court.

---

Upon the first point the testimony shows, that in —, J. J. Whitney received from the executor of his wife's father, \$891.65, also sundry promissory notes, of the nominal amount of about \$3,000. Also in January, 1866, \$1,000 in gold, derived from his wife's mother. It is contended for the appellant that this last sum ought not to be esteemed a debt from J. J. Whitney to his wife, until after the mother's death (in 1869). It is shown in the testimony that Mrs. Darden, the mother of Mrs. Whitney, apportioned among her children equally, in January, 1866, five thousand dollars in gold, upon the terms that she was to be supported during her lifetime by her children. It is fairly to be inferred that the principal was to remain with each child, and only the interest or such part of the advancement called in annually as was necessary for her support. This money was received by J. J. Whitney, in 1866, and by him appropriated. If the mother had but a life estate in the fund, remainder to her children, under the will of the husband, the result would not be at all affected. The \$1,000 was realized by J. J. Whitney, the loan or advancement having been made by the mother to his wife; and there arose at once the duty on his part to account to his wife.

The following is a statement of J. J. Whitney's receipts on account of his wife: From the executor of her father, in all, \$891.65; from his wife's mother, in gold, converted by him into currency, at \$400 premium, \$1,400; notes, nominally, \$3,000—upon which five hundred and ninety-nine dollars were collected. Interest might properly have been allowed, the 4th section of the act of 1867 only cutting off recovery for the "*income of the separate property*," after three years from the "*conversion*." Computing interest upon the several sums from the date of receipt, not exceeding three years, and it shows an indebtedness equal to, and in excess, somewhat, of the value fixed upon the land.

Many witnesses were examined as to the value of the land, and, as common experience attests, differed in opinion. There is no proof of a fraudulent intent, unless the evil design may be in-



---

Opinion of the court.

---

ferred from circumstances. No fact is indicated from which such deduction can be made, except the alleged inadequacy in the price. It was not possible, at the time these transactions were occurring, to estimate the value of real estate with arithmetical certainty; it depended upon locality, fertility, improvements, and demand for that sort of property. The divergence in the estimates of the witnesses proves that. Some were of opinion that the land was worth less than \$1,500; others, about that sum; and others, more. It would be a rigid rule, on the question of fraud as to creditors, in the absence of testimony as to the evil intent, to go into a nice balancing of the conflicting opinions of witnesses as to value, and condemn the sale, on a mere preponderance in favor of a higher price than that given. There must be such inadequacy as to beget the belief that the sale was a contrivance to evade creditors. The testimony fails to produce that effect. Weighing and comparing it, a legitimate conclusion might be that the price was fair; certainly the candid mind would not repose with confidence in the conclusions that the value fixed by the parties was too low.

The appellant interposes the "proviso" to the 23d art., Laws 1857, p. 336, as conclusive of his right to subject the property to his judgment, "that any deed from the husband to the wife for her use, shall be void as against his creditors who were such at the time of executing the deed." Kaufman, the complainant and appellant, was a creditor at the date of the deed, and could successfully plead this statute in avoidance of it, if conveyances resting upon a valuable consideration are embraced by it. The statute of 1839, *pari materia*, "for the protection and preservation of the rights of married women," contained this proviso to the section descriptive of the modes by which she may acquire property, "provided the same does not come from the husband after coverture." In *Ratcliffe v. Dougherty*, 24 Mis., 181, it was declared that this proviso did not change the rule in equity. That rule was that a post nuptial settlement, though voluntary, was valid

---

Opinion of the court.

---

against the husband and his representatives, and, if for a valuable consideration, was good against creditors. In *Wiley v. Grey*, 36 Miss., 516, it is distinctly announced that this proviso would only affect "voluntary conveyances," though made directly to the wife. The same import and signification was given by this court in *Stanton v. Butterfield* (*ubi supra*) to the proviso in the statute of 1857, above quoted.

The doctrine of the cases is, that a conveyance made by husband to the wife directly, if supported by a valuable consideration and pure motive, will in equity be sustained as vesting the estate beneficially in her, and will prevail against a creditor.

But the act of 19th February, 1867, sec. 6, repeals this proviso, which leaves the subject to be controlled by the general principles of equity. This repeal, it will be noted, took effect before the execution of the deed from J. J. Whitney to his wife.

If there were any doubt upon the question of the statute of limitations, which is said by the defendant to have barred complainant's claim against her husband, it is disposed of by the 5th section of this act, which continues it in vitality during the coverture, and afterward.

The defendant specially demurred to the bill for multifariousness. It is in accordance with the rules of pleading, and of great practical utility, in many instances, to frame the bill in a double aspect, with a prayer for alternate relief. This bill does not contain two separate and independent causes of action arising out of separate and disconnected transactions. The complainant insists that her purchase from her husband was fair and *bona fide*; but if the court should find otherwise, then she claims a priority over the defendant to satisfaction of whatever sum may be due her for the conversion and appropriation of her funds by her husband, as provided for in the 2d section of the act of 1867, pp. 725, 726 (pamphlet). This relief depends upon the same series of facts which give rise to the other prayer, that she may be protected in her purchase, viz.: the conversion of her money by the husband,

---

Opinion of the court.

---

as in the former alternative, giving her, under the statute, priority over other creditors; and, in the latter, furnishing a valuable consideration for the conveyance made to her. The bill is not multifarious.

The amended and supplemental answer sets up an original liability on Mrs. Whitney for the goods sold and which constitute the cause of the defendant's recovery against J. J. Whitney at law. But it falls far short of stating the necessary facts; it does not aver that when the goods were bought, Mrs. Whitney was the owner of a separate estate.

The answer also sets forth that the goods were sold on the credit of the land, and therefore the defendant had a specific priority over the complainant, although her deed is elder than his payment. This pretension is predicated of the 24th art., Code 1857, p. 336, and the 2d section of the act of 1867, already referred to. Both statutes agree in charging the husband as trustee for the wife, when he employs her money or effects in making purchases, and takes the title in his own name. The last clause of the former is, "but such trust shall be void as against creditors of the husband who contracted or gave credit in consequence of the provision of such property." The proviso to the latter makes void the trust, in favor of *bona fide* purchasers, without notice of the trust. It is manifest that the statute of 1857 does not apply, because there is no pretense to say that J. J. Whitney expended the wife's money or means in the purchase of the land. The same observation is true of the act of 1867. These statutory provisions provide a rule to protect a creditor, and allow him satisfaction out of the property although bought with the wife's money or effects; if the possession of the husband induced him to give the credit, also to protect a purchaser for value from the husband without notice of the wife's equity.

There is no error in the decree. Let it be affirmed.

---

Statement of the case.

---

## W. W. SHEARER v. ELIZA A. SHEARER, Adm'x, et al.

1. CHANCERY COURT — DEMURRER — FRAUD. — Where the complainant's bill charges a combination to cheat and defraud the complainant, and the defendant filed a general demurrer to the bill: *held*, that the demurrer to that part of the bill charging defendants with a combination to cheat and defraud, was bad. That part of the bill required an answer, and the demurrer should have been overruled.
2. SAME — SAME. — It is a general rule that a demurrer cannot be good as to a part which it covers, and bad as to the rest, and therefore it must stand or fall altogether.

APPEAL from the Chancery Court of Chickasaw County. Hon. AUSTIN POLLARD, Chancellor.

The bill avers substantially that complainant held three promissory notes on Thomas B. Shearer, payable respectively at four, five and six months, for the aggregate sum of \$5,361.36; that Thos. B. proposed to take up the notes, and W. W. a written obligation to sell valuable lands owned by him in the city of Okolona, as the agent of W. W., and apply the proceeds to payment of his said debt as soon as he could release the same from trust deed with which the lands were then incumbered, in favor of Mrs. L. O. Walker, all of which was agreed to, the obligation was entered into, and the notes were surrendered. That Thomas B. afterwards sold a part of the property to Mrs. Walker in payment of his indebtedness to her, and at other times made partial payments to her, and the bill charges upon information and belief, that he paid off his entire indebtedness to her; that Thomas B. died October 29, 1869, and without having Mrs. Walker's deed of trust canceled. That his widow, Eliza A., qualified as his administratrix, and had a part of the land in complainant's written agreement contained, set apart to herself as exempt, though disconnected with the homestead, and that complainant had no notice of the proceedings. That the widow and heirs had notice of his written agreement with her husband, and that afterwards, on the 21st of June,

---

Statement of the case.

---

1872, F. Hodges, the trustee for Mrs. Walker advertised to sell a 24-acre lot to satisfy the balance due her of \$444.75. That complainant, prior to the sale, made a tender of \$444.75 in U. S. currency to Mrs. Walker, being the amount claimed to be due, which she declined; he then made the same tender to F. Hodges, the trustee; he declined, and proceeded to sell the land; that on the day of sale, and before it took place, complainant made public proclamation of his interest, to all the bystanders. The trustee sold, and Mrs. Eliza Ann Shearer, the widow and administratrix, became the purchaser at \$1,350. That she has never paid one dollar of that bid to the trustee, nor has the trustee made her a deed.

That Mrs. Walker, Mrs. Shearer and F. Hodges did combine, and confederate together and with each other, to wrong and injure complainant in the premises, by defeating his lien, and cheating and defrauding him out of the amount due him by Thomas B. Shearer, and that the estate of Thomas B. is wholly insolvent. The bill exhibits letters of Thomas to complainant (which the bill charges), shows the intention of the parties, etc. The prayer is for an account to be taken, and a commission appointed, in whom shall be invested the title of the 24-acre lot of land, that the same be sold and the proceeds paid to the complainant, less the amount due Mrs. Walker, and that F. Hodges be required to enter satisfaction on the trust deed, and for general relief.

To this a demurrer was filed, stating for grounds of demurrer,

1. Want of equity of the face of the bill.
2. Want of jurisdiction in the court.
3. The complainant's remedy is complete at law.
4. Because the instrument sued on was not sealed, acknowledged, witnessed or recorded.
5. Because the instrument sued on was conditional in its terms, and was to be performed only upon the happening of certain contingencies, which have never happened.
6. For multifariousness.

The court sustained the demurrer and dismissed the bill, and

---

Briefs.

---

complainants appeal to this court, and assign for error, that the chancery court erred in sustaining defendant's demurrer to complainant's bill, and dismissing said bill.

*McIntosh & Houston*, for appellants :

Contended that W. W. Shearer held an equitable lien. Washburn on Real Property, 2 vol., top page, 43. The chancery court will regard the substance, and not the form of an agreement. Story Eq. Jur., § 791. If a person contract in writing to sell and fail to do so, but sells to another person, who has knowledge of the contract, the latter will be compelled to perform the contract of the first party making it. Story Eq., 784; Walker v. Williams, 30 Miss., 165; 2 Washburn Real Property, 43; 4 Mass., 444. In order to complete his remedy, it was necessary that a decree obtained by fraud and deceit at a former term should be set aside. Plummer v. Plummer, 37 Miss., 185; Person v. Nevitt, 32 Miss., 180. The cause of demurrer for multifariousness is not well taken. Groves v. Hall, 34 Miss., 419.

*Frank Johnston*, for appellees :

The writing filed with the bill as "Exhibit A" and recited in the bill is not sealed, acknowledged, or witnessed, and conveys no legal title to the complainant. There was no obligation to convey to W. W. Shearer in payment of the notes; the extent of the obligation was simply this: "I owe you a large debt, I will try to pay off the lien on this land now held by Mrs. Walker; when I succeed in this, I will endeavor to sell the land, and when sold, I will pay you out of the proceeds of the sale." If the debtor had sold the land on a credit, taking the purchaser's notes and promised to pay complainant his debt out of the notes, it is clear that *this would not have amounted to an equitable dedication or assignment*, and there is no difference between this and the case at bar. In every supposable case where the creditor has a legal or equitable mortgage on real estate, and the specific property itself is sold, on credit, he can reach the purchase money, provided there is no intervening equity in favor of a third

---

Opinion of the court.

---

person. The bill is defective in this : It alleges that at the January term, 1871, of the probate court, a decree was made setting apart the 24 acre lot and another lot, where the said Thomas B. resided in his life time, as a homestead exemption to his widow and children. That decree was final at the close of the January term, 1871, and no appeal was taken. Rev. Code, 1871, pp. 401, 431. In the administration of insolvent estates, all creditors share equally. Rev. Code, 1871, § 1162. The bill is multifarious. Each case must stand and be decided on its own specific facts. *Darcey v. Lake*, 46 Miss., 109. These several matters cannot be joined in one bill, besides, such a bill does not lie for the sale of the decedent's land for the payment of debts under the statute, and counsel misapplies the scope of the statute above cited. See Rev. Code of 1871, §§ 1148, 1153 and 1159.

PAYTON, C. J., delivered the opinion of the court.

This was a bill filed by the appellant to redeem a prior deed of trust upon certain land in Chickasaw county, and to subject the same to the payment of his claim against the estate of which the appellee is administratrix, by virtue of a written agreement by which Thomas B. Shearer in his life time agreed with the appellant to hold certain real estate as security to pay his indebtedness to the appellee.

The bill charges that the written agreement created a charge in the nature of a lien on the real estate specified therein. The bill further charges that Eliza A. Shearer, F. Hodges and Mrs. L. O. Walker combined together to wrong and injure the appellant and defeat his lien on said property.

The defendants in the court below appeared and interposed a demurrer to the bill which was sustained by the court, and the bill dismissed. And this action of the court below is here assigned for error.

It will be observed there was no answer to that part of the bill which charges a combination to cheat and defraud the plaintiff be-

---

Syllabus.

---

low. The demurrer is applied to the whole bill, and is bad as to that part of which charges defendants with a combination to cheat and defraud the plaintiff. This requires an answer. For it is a general rule that a demurrer cannot be good as to a part which it covers and bad as to the rest, and therefore it must stand or fall altogether. Story's Eq. Pl., 469, sec. 413.

If it be true that the agreement creates a charge on the land in the nature of a lien, as charged in the bill, the complainant would have a right to equitable relief. The demurrer admits the truth of the facts and allegations well pleaded in the bill, and this being so, the demurrer should not have been sustained.

For these reasons, the decree must be reversed, the demurrer overruled, and the cause remanded with leave to appellees to answer the appellant's bill within forty days from this date.

---

O. L. KIMBROUGH v. J. H. CURTIS et al.50 117  
82 798

1. **CHANCERY PRACTICE—AMENDMENTS TO BILLS.**—The practice in this state, under the liberal rules of amendments of pleadings authorized by statutes, is to entrust to the courts of original jurisdiction a very large discretion over the pleadings. It is no abuse of that discretion to allow a defendant to withdraw an answer and put in a demurrer to the bill, especially if the bill does not state a title to the discovery and relief sought.
2. **SAME—CONTRACT—MUTUAL AND DEPENDENT.**—Where a conveyance is to be made upon payment of the purchase money, the respective acts are dependent and neither party can insist upon the performance of the thing stipulated to be done by the other without performance or an offer to perform upon his part. A mere allegation in the bill of an offer and readiness to make a deed will not do. *Klyce v. Broyles*, 37 Miss. Rep. 524. *Robinson v. Harbour*, 42 Miss., 800.
3. **SAME—NECESSARY PARTIES, ETC.**—Where the administrator of the vendor is the complainant, asserting against the assignee of the vendee, the security held by him for the debt, the heirs of the vendor are necessary parties, so that their title may be divested. That must be so unless the administrator tenders a proper deed from the heirs.



---

Opinion of the court.

---

4. SAME — REMEDY IN EQUITY OF THE ASSIGNEE OF A NOTE. — The assignee of a note for the purchase money can maintain a bill against the vendor and vendee or their respective representatives, to enforce the lien and for specific performance of the contract of sale, and it is no objection to the bill that a deed was not tendered, for the title did not reside in the complainant and he could only reap the benefit of his equity by demanding that the parties to the contract of sale shall be held to the performance of their respective covenants.

ERROR to the Chancery Court of Leflore County. Hon. J. J. HOOKER, Chancellor.

The opinion of the court contains a sufficient statement of the case.

*James Somerville*, for plaintiff in error.

1. The court erred in permitting the defendant, Walton, to withdraw his answer filed at a previous term, and interpose a demurrer. The whole proceedings were thus set aside. Amendments of pleadings are liberally allowed when necessary to bring the merits of the cause properly before the court. But this application was not made for that purpose. The demurrer makes a technical objection to the bill, which was waived by the defendant in his answer.

2. The court erred in sustaining the demurrer. *Robinson v. Harbour*, 42 Miss., 795.

*Geo. L. Potter and Thomas Walton*, for defendants in error.

1. The settled rule in this state is, in cases like this, that a bill does not lie until after a tender of a deed. 37 Miss., 524; 7 How., 172, 167; 10 S. & M. 560; 40 Miss., 477; 28 Miss., 242; 30 ib., 273, 258, 576; 34 ib., 131; 23 ib., 78; 3 How., 398; 13 S. & M., 48.

SIMRALL, J., delivered the opinion of the court:

A. L. McCaskill, the complainant's intestate, agreed in writing to sell and convey to Curtis, a certain tract of land; the conveyance to be made upon payment of the purchase money. By a separate instrument, either a bond or a promissory note, Curtis

---

Opinion of the court.

---

obligated himself to pay, "when the first steam car shall run on the Mississippi Central Railroad, through any part of Carroll county," which event, the complainant alleges, occurred on or about the first of February, A. D. 1860.

In 1862, Curtis sold and conveyed the land to defendant, Thomas Walton, who had notice of the contract with Curtis. The bill was filed by O. L. Kimbrough, administrator of the estate of A. L. McCaskill, deceased, for relief in the nature of specific performance, that is to say, that unless Walton shall pay by a short day the purchase money, then that the land shall be sold. The complainants tendered with their bill, a deed purporting to be executed by the heirs of McCaskill to Curtis.

To this bill, Walton filed an answer disclaiming all interest in the subject matter of the suit, alleging that before the suit was brought, he had conveyed the land to Mary Ann Walton and to Shields.

The complainant then filed an amended and supplemental bill, making Mary Ann Walton and Shields defendants, and asking against them the relief sought in the original bill against Thomas Walton.

It appears that the court permitted Walton to withdraw his answer, and disclaimer to the original bill; and to file a demurrer thereto.

This is the matter of the first assignment of errors. The practice in this state, under the liberal rules of amendments of pleadings, authorized by statutes, is to entrust to the courts of original jurisdiction a very large discretion over the pleadings. It is no abuse of that discretion to allow a defendant to withdraw an answer and put in a demurrer to the bill, especially if the bill does not state a title to the discovery and relief sought. In considering such application, the chancellor should examine the bill, with a view to determine whether the objections taken to it are well founded, and whether that reformation of the pleadings would tend to, and contribute to a disposition of the cause on the merits.

---

Opinion of the court.

---

But the action of the chancery court in this behalf could have no material effect upon the ultimate issue of the controversy; for Walton presents himself in the attitude of a nominal party, having previously transferred all of his interest in the land to other parties.

It is assigned secondly for error, that the demurrers of the defendants to the original and supplemental bills, ought to have been overruled.

The doctrine was put at rest in this court, by the cases of Klyce v. Broyles, 37 Miss. Rep., 524, and Robinson v. Harbour, 42 Miss., 800, 1, 2, 3. That where the conveyance is to be made upon payment of the purchase money, the respective acts are dependent, and neither party can insist upon the performance of the thing stipulated to be done by the other, without performance or an offer to perform on his part.

If the vendor is the complaining party, he must put his adversary in default by showing that he had tendered a deed conforming to his contract, and demanded the money before suit brought. Klyce v. Broyles, *supra*.

A mere allegation in the bill of an offer and readiness to make a deed, will not do. (Ibid.)

The reason upon which the principle rests is, that it is not to be presumed that the vendee will pay his money without receiving the equivalent in the title to the land. Nor that the vendor will convey without receipt of the money.

But does the complainant — the personal representative of the vendor — sustain the same relation to the title that the vendor did? He could not tender a deed, unless the heirs of his intestate should execute it and place it at his disposal. Nor should he be permitted to enforce payment against the vendee by sale of the land, unless the opportunity were afforded him to obtain the legal title, by complying with his contract to pay the money. If the heirs should decline to convey at the request of the complainant, the vendee should not be compelled to pay.

---

Opinion of the court.

---

The relations and rights of the several parties are these: the complainant is a creditor, with the benefit of the security attending the debt. The vendee, the debtor, is entitled to a proper assurance of title on parting with his money, or his assignee is subjected to the same responsibility. The law esteems the title as retained by the vendor as security for the purchase money. The assignee of the purchaser takes the equitable title incumbered with a quasi lien for the debt to the original vendor.

When the administrator of the vendor is the complainant, asserting against the assignee of the vendee the security held by him for the debt, the heirs of the vendor are necessary parties, so that their title may be divested. That must be so, unless the administrator tenders a proper deed from the heirs. But the complainant alleges in his original bill, that Curtis sold and conveyed the land in 1862 or 1863, to Thomas Walton, and offers, with his bill, a deed executed by the heirs, in 1870, to Curtis. The conveyance to Walton operated a transfer from Curtis of his equity, and substituted Walton to all of his rights under the title bond. Under the allegations of the original bill, Walton could not have been required to accept that deed as fulfilling the measure of his rights as assignee of Curtis.

But the supplemental and amended bill alleges that Walton had sold and conveyed to Mary Ann Walton and Shields. To entitle the complainant to relief against them, he should have tendered a deed from the heirs to them; or he should have made the heirs parties, and prayed a specific performance of the original contract with Curtis, and on a failure of these assignees to pay, then the lands be sold.

We have held in a case, analogous to this, that the assignee of the note for the purchase money could sustain a bill against the vendor and vendee, or their respective representatives, to enforce the lien and for a specific performance of the contract of sale; and that it was no objection to the bill, that a deed was not tendered; for the title did not reside in the complainant, and he could only

---

Opinion of the court.

---

reap the benefit of his equity by demanding that the parties to the contract of sale shall be held to the performance of their respective covenants.

In this case the complainant may resort to the security of his intestate for the debt. But his equity upon the land should not be meted out to him, at the expense of the respective rights of parties arising out of the contract of sale. That can be conserved to them by making them parties to the suit, and adjusting the decree according to their respective equities.

Under neither of the bills could this sort of relief have been administered. It was proper, therefore, to have sustained the demurrer.

We think enough appears in the complainant's bills to show, upon a proper statement of his case, he may have relief. We do not think that it is necessary that the complainant should aver in his bill a tender of a deed from the heirs, before suit brought, nor is he bound to offer such a deed with his bill. It may be impossible for him to induce the heirs to execute a conveyance. The reason of the authorities cited does not apply.

We do not think the bill amenable to the objection, that the contingency stated for the payment of the purchase money, is a wagering or gambling contract. At the date of the obligation, The Mississippi Central Railroad was being constructed. When the contingency would happen was uncertain; but it was reasonably certain, according to appearances, that the event would take place at some time in the not remote future. We waive the point made in the demurrer on the statute of limitations, and leave that open if the litigation shall be continued. It does not distinctly appear whether the debt was evidenced by bond or promissory note, nor are dates stated with sufficient precision.

The decree sustaining the demurrer is affirmed; so much as dismisses the bill is reversed, and cause is remanded, with leave to complainant to amend his bill; if not amended, then the chancellor shall dismiss it.

Appellant to pay the costs in this court.

---

Statement of the case.

---

## BENJAMIN GRISWOLD v. JOHN J. SIMMONS et ux.

1. **CHANCERY COURT — WRIT OF ASSISTANCE.** — The decree to sell lands directed the commissioner to "put the purchaser in possession; if necessary that the writ of assistance be awarded." It is no longer a mooted question, that when equity has jurisdiction of a cause, it will retain it for all the legitimate purposes of the proceedings. It will retain jurisdiction in order to administer full relief. 10 S. & M., 184; 34 Miss., 655; 27 Ib., 419; 13 S. & M., 131; 33 Miss., 153. And this includes, in proper cases, the delivery of possession of real estate. Rev. Code, 1871, § 1267; 13 S. & M., 132. The writ of assistance is a process "well known to the law." 2 Daniels Ch. Pr., 1082; 1 Barb. Ch. Pr., 441.
2. **SAME — WHEN THE WRIT OF ASSISTANCE SHALL ISSUE.** — The writ of assistance should issue upon the complainant filing with the clerk a petition, and proof of service of the order of the chancellor upon the defendant, and demand of possession, and his refusal to surrender.

**APPEAL** from the Chancery Court of the Second District of Hinds County. Hon. W. B. PEYTON, Chancellor.

This cause was a bill brought by the appellees against the appellant, to enforce a vendor's lien on lands. The sale had been made, and upon the coming in of the commissioner's report thereof, the appellees, who were the purchasers, moved the court to confirm the sale, and deliver a deed to the purchaser, "and that he put said purchaser in possession of said land so sold by him, and if necessary, that a writ of assistance may issue to place said purchaser in possession of said premises, and that the defendant pay the costs of the cause," all of which the court accordingly decreed. To the part of the said decree, empowering the commissioner to give possession, awarding a writ of assistance, and decreeing costs, the appellant excepted, and took this appeal therefrom.

Two errors are assigned by counsel for the appellant, to wit:

1st. The court erred in decreeing that the commissioner, selling the land, should put the purchaser in possession of the same, and in awarding a writ of assistance if necessary.

2d. The court erred in inserting in the decree ratifying the sale

---

Brief for appellant.

---

of the lands, provisions which, if proper at all to be decreed, should have been inserted in the final decree.

*E. E. Baldwin*, for appellant.

The first error assigned involves the question of a court of chancery to take jurisdiction of the possession of lands, and put purchasers of lands, sold under its decrees, in possession.

It is a well known proposition that a court of equity will not interfere when the complainant's remedy at law is clear and unembarrassed. *Shotwell v. Lawson*, 1 George, 27; *Boyd v. Swing*, 9 George, 182.

It will not be for a moment denied that the remedy to obtain possession of lands is by an action at law.

Such was the ancient principle, and it still remains undisturbed by any statute in this state. *Ezelle v. Parker*, 41, 521.

This being the case, the court had no right to take jurisdiction of the possession of the lands in question, and order the commissioner to put the purchaser into possession, but should have left him to his remedy at law.

The second error assigned involves the question of the power of a court over a cause, after the final decree has been made.

The jurisdiction of the court ceases after final decree, if there be nothing to be done in execution of the decree. *Goff v. Robbins*, 4 G., 153.

This principle being true, the final decree in the cause having been long before made, the court erred in decreeing anything further than the ratification of the sale, and the provisions therein that the purchaser should be put into possession, awarding a writ of assistance, and decreeing the costs of the cause against the appellant, came altogether too late, if they were even proper to be made at any time, but should have been in the final decree, and if not then, cannot now be taken cognizance of by the court.

*C. E. Hooker*, for appellees.

The reporters find no brief among the papers in this case.

TARBELL, J., delivered the opinion of the court.

---

Opinion of the court.

---

Submitted under rule 22. This cause has been once before in this court, when the decree of the chancellor on the merits was affirmed. It comes here now on appeal to the decree confirming the report of the commission of the sale of the premises sold in obedience to the final decree affirmed by this court.

It is specially objected to the decree now appealed from, that it directs the commissioner making the sale to put the purchaser in possession; that it awards a writ of assistance, and decrees costs.

The decree is, that the commission to sell the lands, put the purchaser in possession; "if necessary," that the writ of assistance be awarded, and "that the defendants herein, and their sureties on their appeal or writ of error bond to the supreme court, do pay all the costs herein."

If ever, it is not now a mooted question, with us, that when equity has jurisdiction of a cause, it will retain it for all the legitimate purposes of the proceeding; or, in other words, it will retain jurisdiction in order to administer full relief. 10 S. and M., 184; 34 Miss., 655; 27 ib., 419; Wilson v. Polk, 13 S. and M., 131; 33 Miss., 153. And this includes, in proper cases, the delivery of possession of real estate. Daniel's Ch. Pr.; Barb. Ch. P.; Code, § 1267; 13 S. and M., 132; 2 Smith's Ch. Pr.

No part of chancery practice is more familiar or better established than the writ of assistance. See Code of 1857, p. 555, art. 98, where this writ is expressly provided for by its name, *habere fucias passionem*, to be issued of the court of chancery, while § 1267 of the code of 1871, provides, that the clerk of the chancery court "shall issue all final process of every kind known to the law, which may be necessary to execute the decrees and judgments of the court."

The writ of assistance is a process "*well known to the law.*" 2 Daniels Ch. Pr., 1082, and notes; 2 Barb. Ch. Pr., 441.

This writ is issued upon proof of noncompliance with the orders or decrees of the court, on demand of obedience thereto. 2 Barb. Ch. Pr., *supra*. By the clerk. Code, § 1267. And is executed by the sheriff, or by a commissioner named in the decree. 1b., 1266.



---

Opinion of the court.

---

In the case at bar, the decree directs the writ to issue, "if necessary."

As to costs, the decree simply complies with the mandate of this court, or directs the clerk of the chancery court to comply therewith. The taxation of costs against the party and his sureties, followed the mandate of the appellate court, as of course. And this is the whole of the decree as to costs.

Goff v. Robins, 33 Miss., 153, is referred to by counsel, for the doctrine, that after final decree, the jurisdiction of the court ceases. In that case, however, it is held, that the jurisdiction of a court of chancery ceases after a final decree, when there is nothing to be done in execution of the decree; but when, in order to give the successful party the benefit of the decree, it is essential that it be executed, jurisdiction does not cease until such execution has been had; nor is it necessary to continue a cause upon the docket, in order to preserve the jurisdiction of the court for the execution of the decree, though it would be the more regular and formal mode of proceeding.

In Hill v. Richards, 11 S. & M., 194, the cause had been dismissed, and jurisdiction lost of course. The question in Wilson v. Polk, 13 S. & M., 131, was, whether a stranger to the proceedings, becoming a purchaser of land at a sale under a decree of the court of chancery, was entitled in his own name to a writ of assistance. It was held, that the purchaser, who was not a party to the original suit, could only proceed by getting the vendor to make application for the process. In the case at bar, the complainant became the purchaser, and the defendant alone is complaining of the order of the chancellor appealed from.

The complainant, in a written petition praying the confirmation of sale, asks for the writ of assistance, which was awarded "if necessary." Upon filing with the clerk proof of service of the order of the chancellor upon the defendant, and demand of possession, and his refusal to surrender, the writ would issue.

Decree affirmed.

## Statement of case.

## S. H. KELLOGG v. D. M. FREEMAN.

1. GARNISHMENT — WHEN JUDGMENT AGAINST GARNISHEE. — In order to condemn the debt to the satisfaction of defendant's indebtedness to his creditors, the plaintiff in attachment must sustain the writ, if controverted, and must also recover judgment for his debt, and not until there has been a recovery against defendant, can a judgment be taken against the garnishee on his answer.
2. SAME — JUDGMENT AGAINST DEFENDANT IN ATTACHMENT — EFFECT OF. — Judgment against garnishee, judicially determines that the garnishee is released from liability to his original creditor, and declared to be debtor to the attaching creditors. By such judgment the debt is transferred by operation of law, and inures to the benefit of the creditors of defendant in attachment suit. *Roberts v. Barry*, 42 Miss. R., 260.
3. SAME — CODE 1871, SEC. 1451. — This statute provides a remedy for a garnishee. It directs that the garnishee shall pay into court the amount of the debt, suggesting that some other person claims title to or an interest in the debt, and causes a citation to issue to such person to appear and contest with the plaintiff his right. Thereupon the court shall suspend all further proceedings. This mode of procedure is a substitute for the remedy by "interpleader" in equity.

ERROR to the Circuit Court of Yazoo County. Hon. W. B. CUNNINGHAM, Judge.

Freeman sued Kellogg and F. W. Battaile in the circuit court of Yazoo county, on a draft drawn by Battaile and accepted by Kellogg, April 7, 1871, payable to D. M. Freeman, thirty days after date, for three hundred dollars. The draft was indorsed by Freeman. The defendants pleaded the general issue. Kellogg filed an additional plea, that on the 7th of April, 1871, before the commencement of this suit, one C. M. Battaile and O. E. Hubbell and wife, had sued out an attachment against the plaintiff, returnable to the circuit court of Yazoo county, which had been executed by summoning him and Kellogg as garnishees; and that before the commencement of this suit he, as garnishee, had filed his answer to said writ of garnishment, admitting his indebtedness to said Freeman, to the amount of the draft or bill of

50	127
271	390
50	127
75	759
50	127
280	785

---

Opinion of the court.

---

exchange sued on, and that said writ of attachment of C. M. Battaille and others was still pending and undetermined in said court, and that he, Kellogg, had never been discharged or released as garnishee. A demurrer was sustained to this plea, and judgment rendered, and Kellogg excepted, and brings the case here by writ of error.

*Robert Bowman*, for plaintiff in error.

If the attachment suit shall finally be decided in favor of Battaille and Hubbell, judgment will be rendered against Kellogg; for the reason that all debts, choses in action attached, shall be bound by such attachment from the date of service. Rev. Code of 1871, § 1434. The ground upon which the demurrer was sustained was, that Kellogg's remedy was by bill of interpleader. But that remedy could not apply. All the parties were before the court; and the circuit court had full jurisdiction of the whole subject matter and the parties. Rev. Code of 1871, § 1478. The bill cannot be filed except in a case where the plaintiff can be protected in no other way from unjust litigation in which he has no interest. *Badeau v. Rogers*, 2 Paige, 209; *Bedell v. Hoffman*, *ib.*, 199; 3 Dan. Ch. Pr., 1560.

*J. A. P. Campbell*, for defendant in error,

Contended that the demurrer was properly sustained. No judgment could be rendered against the garnishee until a judgment was had against the defendant in attachment. The plea was therefore no bar to the recovery against the defendant Kellogg. If judgment was rendered against the plaintiffs in the attachment suit, after Kellogg's plea had been permitted to bar Freeman's rights, Kellogg would thereby escape liability and be released from paying the debt which he has acknowledged to be due. 42 Miss., 511; *ib.*, 260; 14 S. & M., *Mandell v. McClure*, 11.

SIMRALL, J., delivered the opinion of the court:

The plea alleges that defendant had been summoned as garnishee, in an attachment suit, brought by C. M. Battaille and O. E.

---

Opinion of the court.

---

Hubbell, against Freeman, and that he had answered that he was indebted to Freeman in the amount and for the identical cause sued for in this action; that he has never been discharged, but the attachment suit is still pending and undetermined. To that plea a demurrer was sustained. Does the plea contain matter sufficient to bar the recovery?

The service of the summons on Kellogg, the defendant, was the first of a series of steps necessary to transfer and appropriate the debt owing to Freeman, to his attaching creditors. In order to condemn the debt to the satisfaction of Freeman's indebtedness to his creditors, the plaintiffs in the attachment must sustain their writ, if controverted, and must also recover a judgment against Freeman, and not until there has been recovery against Freeman, can a judgment be taken against Kellogg, on his answer. If the creditors should fail to sustain their attachment, and recover against Freeman, the garnishment would be of no effect. It is the duty of the garnishee to see that these conditions precedent are complied with in order to protect himself against Freeman, his creditor. The judgment against the garnishee is the efficient thing by which the relation of creditor and debtor is dissolved between Kellogg and Freeman, and established between Kellogg and the attaching creditors. Until that judgment is pronounced, it has not been judicially determined that Kellogg is released from liability to Freeman, and declared to be debtor to the attaching creditors. By such judgment the debt is transferred by operation of law, and inures to the benefit of Freeman's creditors, and to pay them. *Roberts v. Barry*, 42 Miss. Rep.; *Drake on Attachments*, 306, § 460.

The argument in support of the plea is, that unless the defense can be made, Kellogg may be adjudged in this suit to pay Freeman, and in the attachment suit to pay Battaile and Hubbell.

The remedy for Kellogg, is provided in section 1451, code of 1871, to pay into court "the amount of the debt," suggesting that Battaile and Hubbell claim title to or an interest in the debt,

---

Syllabus.

---

"and cause a citation to issue to them, to appear and contest with Freeman their rights. Thereupon the court shall suspend all further proceedings," \* \* etc.

This special statutory procedure was borrowed from equity jurisprudence. The ground of the interpleader in a court in equity is, "that the party himself claims no right in the subject matter, but he is, or may be vexed by having two legal, or other processes in the names of different persons going on against him at the same time. 2 Story Eq. Jur., § 807. Where a controversy exists between two claimants of a debt as assignor and assignee, the debtor may make them interplead to settle the point of right. *Lownds v. Cornford*, 18 Ves., 299; 2 Story's Eq., § 808. This is an accurate delineation of the dilemma in which Kellogg is involved. The statute devolves upon the circuit court, in a simple method, the jurisdiction to settle the "right" between the contestants. It was because the common law was inadequate to give complete protection against conflicting claimants, that the statute conferred the special remedy.

We think that the mere pendency of the attachment suit, and adjunct garnishment process (no final judgments against the defendants thereto having been rendered) cannot be pleaded in bar of this suit.

The judgment is therefore affirmed.

---

A. H. WHITE v. E. S. SHUMATE.

1. **APPEAL FROM JUSTICE'S COURT — AFFIDAVIT.** — The omission of the word "delay" in an affidavit for appeal, sued out within the time prescribed by statute, cannot defeat the object and purpose of the appeal, which is, in the language of the affidavit, that justice may be done.
2. **SAME — AMENDMENT THEREOF.** — Where an affidavit for an appeal does not substantially comply with the statute — the court upon application should allow the party to amend it, provided the application to amend is made within a reasonable time.

---

Statement of case.

---

ERROR to the Circuit Court of Lauderdale County. Hon. ROBERT LEACHMAN, Judge.

This was an action of assumpsit by Shumate against White, before Wilcox, mayor of Meridian, and *ex officio* justice of the peace. The summons issued on the 20th day of March, 1873, in the usual form — the cause of action is described as defendant's promissory note due and payable by the 1st of December, 1872, for \$131 04-100, dated May 18, 1872, with interest from the 13th of January, 1872. The note is substantially as described by indorsement on the summons; but is payable to J. M. Shumate or bearer.

Defendant appeared and filed offset against J. M. Shumate, the payee, for \$25.25.

The justice gave judgment for \$108.39.

The justice's record is certified by the J. P.

The affidavit of White, the defendant, was made on the 26th of April, 1873; the substance of the affidavit is in these words: "The appeal prayed in the above stated case is not made to vex, harrass or oppress the said plaintiff, but that justice may be done."

The appeal bond is in the statutory penalty and form and the condition shows that the judgment was renudered on the 23d of April, 1873.

The bond was approved and appeal granted by J. P. on the 28th of April, 1873.

A motion to dismiss the appeal was made and eutered on the motion docket, and judgment sustaining the motion entered at the May term, 1873, of the circuit court.

The bill of exceptions sets out the motion to dismiss the appeal for want of a sufficient affidavit.

On the hearing of the motion the defendant's counsel read to the court, as evidence, the affidavit, which is set out in the bill of exceptions, and the same which is contained in the record, and was returned by the J. P. with the transcript and original papers. Pending the argument of the motion, defendant's counsel asked leave to amend the affidavit instanter. The motion was sustained,

---

Opinion of the court.

---

and the appeal dismissed, and a *procedendo* awarded to the J. P. The defendant's counsel excepted at the time to the judgment of the court in refusing to allow the affidavit to be amended, to the sustaining the resolution to dismiss the appeal and the judgment of the court ordering a *procedendo*, which bill of exceptions was signed by the court.

The writ of error was prayed by the defendant.

The assignment of errors is as follows :

1. The court erred in sustaining the motion of the plaintiffs in the court below.
2. The court erred in not allowing plaintiff in error to amend the affidavit.
3. The court erred in dismissing the appeal and ordering a *procedendo* to the justice of the peace.

*W. W. Steele*, for plaintiff in error :

The only question is, as to the correctness of the judgment of the circuit court, in sustaining the motion to dismiss the appeal, for want of a sufficient affidavit. On a technical construction of the statute, the affidavit is sufficient. It contains every substantive word in the statute. Code, 1871, § 1332. But the question is decided by this court in *Lundy & Brown v. Clark*, No. 860, ms. opinion, 9th February, 1874. It is there held that the statute must be liberally construed, that the affidavit did not have either the words "vex," "harass" or "oppress."

*Smith & Fewell*, for defendant in error.

Reporters find no brief for defendant in error, in the record.

PEYTON, C. J., delivered the opinion of the court :

This is a writ of error from a judgment of the circuit court, dismissing an appeal from the judgment of a justice of the peace for the want of a sufficient and proper affidavit.

It appears to be conceded that the appeal was demanded and bond given within the time prescribed by section 1332 of the revised code of 1871, but the affidavit filed states that the appeal

---

Syllabus.

---

is not made to vex, harass or oppress the plaintiff, but that justice may be done, omitting the word "delay." We think this is a sufficient and substantial compliance with the statute. The statement in the affidavit that the appeal was taken "that justice may be done," negatives the idea that it was taken for delay, and is equivalent in intendment and effect to saying that the appeal was not made for delay.

The omission of the word "delay" ought not to be permitted to defeat the object and purpose of the appeal, which is, in the language of the affidavit, that justice may be done.

But even if the affidavit had not been a substantial compliance with the statute, the court erred in refusing the application to amend it. For, under our statutes, amendments are very liberally allowed, and they cannot be assigned as error, unless manifest injury has been done. But whilst it is the duty of the court to allow amendments on liberal terms, for the purpose of reaching the merits of the controversy, the parties desiring amendments are not to be excused from exercising proper diligence in bringing and preparing their suits for trial. In this case the application to amend was made in time and should have been granted.

For these reasons, the judgment must be reversed and the cause remanded.

---

R. E. WILSON v. H. E. COX et al.

**CHANCERY PRACTICE—RIGHT OF RESCISSION WHEN VENDOR CANNOT CONVEY TITLE.**—Where vendor of a tract of land cannot make title to the same, the general principle is, that in such circumstances the purchaser has an election, either to abandon the contract and to be repaid what he has advanced, or he may compel the vendor to convey to him such estate or interest as he has, and make compensation for the residue. *Martlock v. Buller*, 10 Vesey R., 815. *Jackson v. Ligon*, 8 Leigh, 161. *Mathews v. Patterson*, 2 How., 729.

50	133
177	811



---

Brief for appellant.

---

APPEAL from the Chancery Court of Lauderdale County. Hon. THOMAS CHRISTIAN, Chancellor.

The opinion of the court contains a sufficient statement of the case.

*S. A. D. Steele*, for appellant, cited the following authorities: *Peques v. Mosbey*, 7 S. & M., 340; *Feemster v. May*, 13 ib., 275; *Cunningham v. Sharp*, 11 Humph., 116. On application of the vendee the contract will be rescinded. *Greenwood v. Ligon*, 10 S. & M., 615; 13 ib., 275; *Peques v. Mosbey*, 7 ib., 340; 4 How., 435; 6 ib., 673; 44 Miss., 50; 39 ib., 477; 34 ib., 432; 28 ib., 340; 1 S. & M., 443; 11 ib., 368.

The defendant cannot resist a decree if a good title can be made. *Seton v. Slade*, 7 Vesey, 265. So if the title cannot be made, the trade should be rescinded. If the vendor has taken no steps to make out his title when the time has elapsed, and the purchaser has immediately insisted upon a repayment of the amount paid, equity will not decree a specific performance, and when the vendee offers to rescind because the vendor could not obtain title, the court will decree a rescission. 3 Lead. Cas. Eq., 59.

Can the vendor at the time of hearing make a good title? See *Jenkins v. Hils*, 6 Ves., 646; *Wynn v. Morgan*, 7 ib., 202; 3 Lead. Cas. Eq., 60. The title must be made out at the time of the master's report. *Kirwan v. Blake*, 2 Mall., 581, 582; *Cowgill v. Lord Oxmantown*, 3 Y. & C. Exch. Cas., 369. If the vendor can procure title in a reasonable time he will be put under rule to do so. *Stourten v. Sir Thos. Meers*, 1 P. Wm., 146; 3 Lead. Cas. Eq., 60. The vendee is not required to take the title when a suit is necessary to complete it. *Lechmere v. Brasier*, 2 J. & W., 289; *Dalby v. Pullen*, 3 Sim., 29; 1 Russ. & My., 296; *Coster v. Turnor*, ib., 311; 3 Lead. Cas. Eq., 61, cases cited. *A fortiori* would the vendee not be required to specifically perform if the vendor could not procure title. A purchaser is not bound to accept a different estate than the one he purchased, for example, a leasehold instead of a freehold estate. *Drewe v. Corp.*, 9

---

Opinion of the court.

---

Vea, 368; Prendergrass v. Eyre, 2 Hogan, 81. A purchaser of an entirety is not compelled to take an undivided share. 3 Lead. Cas. Eq., 69, 70, 71. A vendor cannot have a specific performance unless he can perform the entire contract, whilst the vendee can enforce a performance *pro tanto*, if he is satisfied to do so, and have compensation for the deficit. Mortlock v. Buller, 10 Vea, 315; 3 Lead. Cas. Eq., 72; Attorney General v. Day, 1 Vea, 218; Sugden on Vendor, 302; Cumingham v. Sharp, 11 Humph., 116; Horbus v. Godden, 6 Rich. Eq., 284; Clark v. Reins, 12 Gratt., 98, 112; Waters v. Travis, 9 Johns., 450; Voorhees v. De Myer, 3 Sant. Ch., 614; 2 Barb., 37; Jopling v. Dooley, 1 Yerg., 289; Wiswall v. McGowan, 1 Hoff., 125; Weatherford v. James, 2 Ala., 170; 5 ib., 761; 2 Bibb., 410; 6 Hamm., 169; 2 Ired. Eq., 206; 2 Rand., 120; Matthews v. Patterson, 2 How., 729; 20 Ohio, 453.

Reporters find no brief in the record for appellees.

SIMRALL, J., delivered the opinion of the court:

R. E. Wilson (the appellant) agreed to purchase from H. E. Cox, several tracts of land containing in all about 1,600 acres, for the price of \$2,500, divided into instalments of \$500 each. Cox executed to Wilson a bond to convey, with general covenants of warranty, upon final payment of the purchase money. Two of these instalments amounting to \$1,000 have been paid.

Wilson, the complainant, brought his bill in chancery, and alleges that Cox has title to only one section of land, and part of another—as to the larger part he has no title whatever, and therefore is unable to comply with his contract. That he applied to Cox, either to rescind the contract and restore to him the money which he had paid; or to convey to him so much land as he had title to, making a proper apportionment of the price, offering on his part to perform if Cox would comply by paying the balance of the purchase money. This offer Cox rejected, insisting that the complainant should pay the residue of the price, and accept such title as he was able to convey.

---

Opinion of the court.

---

The prayer of the bill is in the alternative, either for rescission of the contract or a performance so far as Cox may be able to convey, and an apportionment of the price as to value, and for general relief.

Upon demurrer the bill was dismissed. We have not been furnished with an argument in support of the demurrer, and are therefore not advised of the grounds of the decision of the chancellor.

According to the case made in the bill, the defendant sold and agreed to convey much more land than he had title to, or had procured title to, at the time suit was brought. The complainant according to his allegations was in no default, but was willing to complete his payments if he, defendant, would make a title as covenanted to be made. If that could not be done, he was willing to rescind, or to accept performance, as far as defendant was able.

Manifestly, the complainant could claim a rescission of the contract, if the vendor could not make a title to half of a large tract, which he had bargained to convey.

It might be, that the portion of land to which the vendor could not make title, was much more valuable, and constituted the chief inducement to the purchase.

The principle is, that in such circumstances the purchaser has an election, either to abandon the contract and to be repaid what he has advanced, or he may compel the vendor to convey to him such estate, or interest as he has, and make compensation for the residue. *Mortlock v. Buller*, 10 Ves., 815.

In *Jackson v. Ligon*, 3 Leigh, 161, of a tract of 686 acres, the vendor was unable to make title to 206 acres, which was separated from the other land by a public road, it was held that the purchaser might throw up the whole bargain. The same principle prevailed in *McKean v. Reed*, 6 Litt., 395; *Buchanan v. Alwell*, 8 Humph., 516.

If the inability of the defendant be the cause of the nonfulfillment of the contract, the plaintiff would have the right to a per-

---

Syllabus.

---

formance, so far as practicable, and to compensation on those points which do not admit of fulfillment. *Jacobs v. Lake*, 2 *Iredell Eq.*, 206; *Jones v. Shackelford*, 2 *Bibb.*, 410; *Mathews v. Patterson*, 2 *How.*, 720; *Seton v. Slade*, 7 *Ves.*, 265; 3 *Lead. Cases in Eq.*, 89, 90.

On the case made in the bill the complainant is entitled to relief.

The decree sustaining the demurrer and dismissing the bill, is reversed. Judgment is rendered here overruling the demurrer, and cause remanded with leave to defendants to answer in forty days from this date.

---

BENJAMIN GRISWOLD v. S. P. E. SIMMONS et al.

1. **CHANCERY PRACTICE — VENDOR AND VENDEE.** — S. sold a tract of land to G., reserving the vendor's lien in the deed and in the notes. The deed was duly recorded. G. sold a part of the land to W. G. and W. are made parties to the bill. W. did not defend, and *pro confesso* was taken as to him. The lien and the equity are conceded. There was no interlocutory order confirming the master's report; *held*, that the report of the master in chancery was confirmed in terms by the final decree, and that this action of the court was not error. Where the attention of the chancellor is not called to the points in the case, they cannot in any case be considered in this court.
2. **SAME — CROSS BILL — EVIDENCE.** — A cross bill does not stay proceedings in the original cause, except by order of the court. 2 *Barb.*, Ch. Pr., 184; 2 *Dan.*, 1656. If the cross bill be taken as confessed, it may be used as evidence against complainant in the original cause on the hearing, and will have the same effect as if he had admitted the same facts in the answer. 2 *Barb.* Ch. Pr., 135. The cross bill will not delay the hearing of the original cause. 2 *Paige*, 164; *Story's Eq. Pl.*, § 402.
3. **SAME — RULES.** — It is correct practice to order a referee to compute amount due after a cause is set for hearing, without remanding to rules.

APPEAL from the Chancery Court of Hinds County. Hon. E. W. CABANISS, Chancellor.

---

Brief for appellants.

---

The facts of the case are sufficiently stated in the opinion of the court.

The following is assigned for error :

1st. A final decree was rendered against one of the defendants, Withers, without any notice having been given him of the filing of an amended bill.

2d. The cause was set down for final hearing in the court below by the appellees without an answer to the cross bill of the appellant previously filed (and upon which process had been served upon said appellees), and upon a day preceding the date on which a *pro confesso* thereon could be taken by the appellant.

3d. No order confirming the commissioner's report was taken, but the cause was proceeded with to a final decree without the same having been confirmed.

4th. The reference to the commissioner to compute was obtained after the cause was set for final hearing without remanding it to the rules.

*C. E. Baldwin*, for appellants :

1st. The first error assigned is, that a final decree was taken against two defendants, Griswold and Withers, only one of whom, Griswold, was "in court," the original bill having been dismissed and Withers having had no notice of the filing on an amended bill, as required by the 22d rule of the chancery courts of the state of Mississippi.

It is true that a decree *pro confesso* was taken against Withers upon the original bill. That, however, gave the complainants the right to proceed to a final decree against him, only as to their case as made out by their original bill. When that was in fact dismissed, and an amended bill ordered to be filed, then it became necessary to give him a fresh notice of making out a new case against him, and until this is done, no decree can be taken against him on the said amended bill. *Hunter v. Walker*, 40 M., 595.

2d. The cause was set down for final hearing in the court below by the complainants without an answer to the cross bill of

## Brief for appellee.

Griswold filed, and on a day preceding the date on which a *pro confesso* thereon could be taken.

This was an irregular and hasty proceeding, and, if allowed, entails the evil upon chancery courts of cutting off and ignoring altogether any defense made by cross bill. The defendant, Griswold, was surely entitled either to a *pro confesso* to his cross bill or an appearance thereto.

3d. No order confirming the commissioner's report was taken, but the cause was proceeded with to a final decree without the same being confirmed. "After a report has been filed it must be confirmed before any step or proceeding can be taken upon it." Daniels Ch. Practice, I. 944.

C. E. Hooker, for appellee :

1st. The bill and amended bill is filed to enforce the vendor's lien. This lien is recited both in the deed of vendor and the bills, single, given by the vendee for the deferred payment.

2d. The answer of Griswold admits that the vendor's lien exists and as set out in the bill of the vendors, but claims certain credits, and in order to avoid all error or appearance, even, of error, every single credit claimed is *allowed by report of commissioner* and in the *final decree* of the court.

3d. There was a *pro confesso* as to Withers on the original bill, and the bill charges that he bought forty acres of the land with full knowledge of the existence of the vendor's lien. Whatever rights, if any, he may have or even pretend to have, are carefully provided for and protected in the final decree, which provides that, in the sale of the land, the proceeds over and above the acknowledged debt due and owing by Griswold, and secured by admission by vendor's lien, should be paid to defendant, Griswold or Withers, as the court might direct.

4th. It is the merest pretext to call Griswold's answer a *cross bill*, and the chancellor below very properly disregarded this feature of the answer. Why, in what does the cross bill consist? simply this, that Mrs. Simmons pursued her concurrent remedy at

---

Opinion of the court.

---

law. This court has too often held that the double remedy at law and equity exists, to be now seriously questioned, and the decree provides that the judgment at law shall be credited with the amount for which the lands may sell.

5th. The decree of the chancellor has been superseded since Oct. 24, 1873, the day fixed for sale of the land. The decree which is brought up for review on writ of error, was rendered in August, 1873. There can be no question that this case is brought up *solely for time*.

6th. If it shall be seriously contended that there be anything in naming the answer of Griswold a cross bill, then the defendants in lower court were entitled to their decree *pro confesso*, and may take it here if they wish to.

TARBELL, J., delivered the opinion of the court.

Proceedings in chancery to enforce vendor's lien. Simmons sold and conveyed a tract of land to Griswold. Vendor's lien was reserved in the deed, which was duly recorded, and in the notes given for the purchase money. Griswold sold a part of the tract to W. T. Withers. Griswold and Withers are made defendants. The former appeared and defended. The latter did not appear, and as to him there was a *pro confesso*.

Complainants amended their bill and proceeded with the cause without notice to Withers of the amended bill. Griswold made his answer a cross bill, the only grounds of which are certain items of setoff or payments on the notes, and an averment of a suit at law on those notes. The lien and the equity of the bill are fully conceded. There was a decree that the land be sold. From this decree Griswold appealed and assigned for error:

1. That the decree against Withers, without notice of the amended bill, is erroneous.
2. That there was no order confirming the master's report.
3. That the reference to compute was made after the cause was put down for final hearing, without remanding it to the rules.

---

Opinion of the court.

---

Of the decree against him, Withers is not complaining, and does not join in the appeal. The interest of Withers is fully stated in the bill, and is as amply protected in the final decree as it can be, upon the facts and the law.

The items of payment claimed in the answer and cross bill were allowed as claimed. There is no contest as to amount due. The lien, the equity of the bill and the amount due, according to the final decree, stand admitted and undisputed.

The case for this court, therefore, is narrowed down to trivial points of practice, no way involving or affecting the merits of the the controversy or rights of the parties.

1. That the original cause proceeded in disregard of the cross bill.

A cross bill does not stay proceedings in the original cause, except by order of the court, upon motion and notice. 2 Barb. Ch. Pr., 134; 2 Danl. Ch. Pr., 1656. If the cross bill be taken as confessed, it may be used as evidence against complainant in the original cause, on the hearing, and will have the same effect as if he had admitted the same facts in the answer. 2 Barb. Ch. Pr., 135. The cross bill will not delay the hearing of the original cause. 2 Paige, 164; Story's Eq. Pl., § 402.

2. That there was no interlocutory order confirming the master's computation of amount due.

There were no objections or exceptions to the report. Though not confirmed by interlocutory order, it was confirmed in terms in the final decree.

See Code, § 1027, which provides that "in suits for the foreclosure or satisfaction of mortgages or deeds of trust," the confirmation of the master's report and the final decree on orders "of course," without notice, unless cause be shown to the contrary.

3. That the order of reference to compute was made after the cause was set for hearing, without remanding to the rules.

This is correct practice.

The points made for this court are thus fully stated and ex-



---

Syllabus.

---

plained, though the attention of the chancellor was not called to either, and of course they could not in any case be considered here. They are now explained that counsel may understand the reason of the action of this court, and to state certain rules of practice, which seem not to be well understood.

Time was manifestly the object of the appeal in this case.

Motion sustained and decree affirmed.

---

LUCRETIA IVEY v. JOHN WHITE.

1. **MECHANIC'S LIEN — TO WHAT IT EXTENDS.** — Such liens extend to and take hold of the freehold, if such was the nature of the estate, and is superior to subsequent incumbrances. *Otly v. Haviland, Clark & Co.*, 36 Miss. R., 37; *McLaughlin v. Greene*, 48 Miss., 202. If there be a prior incumbrance, the lien will be operative on the buildings and erections, but not upon the land itself. *Buchanan v. Smith & Barksdale*, 43 Miss., 90.
2. **SAME — ITS BEGINNING — RIGHTS OF PURCHASERS UNDER IT.** — Such liens begin either from the date of the contract or from the commencement of the work on the ground towards the erection of the buildings. *Bell v. Cooper*, 26 Miss. R., 650. The purchaser, under such special judgments, acquires the privileges and benefits of the lien, and his title relates back to the lien, and is invested with its advantages, so as to defeat incumbrances and conveyances made by the judgment debtor subsequent thereto. *Cochran v. Wimberly*, 44 Miss., 505; *Lambert v. Elder*, 44 Miss., 88.
3. **SAME — CLAIM OF WIFE.** — Where the legal title is in the husband, and he incumbers it for its improvement, without notice to the mechanic of the wife's claim, and there was an actual sale under judgment for a debt due the mechanic to one who bought without notice, and conveyed to his vendee, also without notice. Against these parties the secret resulting trusts, if proven, could not be set up. *Boon v. Barnes*, 23 Miss. Rep., 188.

ERROR to the Chancery Court of Chickasaw County. Hon. AUSTIN POLLARD, Chancellor.

The opinion of the court contains a statement of the case.

---

Brief for plaintiff.

---

A. H. Hundy, for plaintiff in error :

1. The alleged judgments did not bind the property as against the title conveyed by the deed to Scoggins. At all events the judgments could only have that effect by Scoggins being made a party as required by the code, p. 328. It is not pretended that he was so made a party.

Thus the sheriff's sale was ineffectual to carry a valid title to Denton, under whom complainant claims; and the bill to remove clouds upon his title cannot be maintained. 39 Miss., 796; Glazier v. Bailey, 47 Miss., 395.

2. But in 1860, Mrs. Ivey paid the money advanced by Scoggins as a consideration for the deed of 1857 to him, and in consideration of that payment, Scoggins then executed a deed to Mrs. Ivey, which vested in her the complete legal title. This money was paid by her after her husband's death, from her own means. Mrs. Ivey having therefore both the legal and equitable title, the complainant has no claim.

3. It appears that the title to the property was conveyed by Waldrop to John Ivey by two deeds — one for the lot known as *Mrs. Ivey's lot*, about which there is no controversy, and the other for the "*Frank White lot*," so called, which is the subject of this suit. It is fully proved by Waldrop, complainant's own witness, that he made the deed to the "*Frank White*" lot to John Ivey, but that the money or consideration was wholly paid by Frank White, Ivey paying nothing for it, and the deed being made to him as a security against his liability as surety for Frank White for the hire of a blacksmith. This is all the proof in the record as to Ivey's title to the "*Frank White*" lot, and it establishes a simple, naked legal title *in Ivey, in trust for Frank White*, which was not divested by the sheriff's sale. It is through that sale that the complainant claims as the source of his title; and it is clear that this did not constitute him the "rightful owner" of the property, within the sense of the statute, so as to enable him to maintain this bill to remove clouds and doubts upon his title.

---

Brief for appellee.

---

Jayne v. Boisgerard, 39 Miss., 796 ; Huntington v. Allen, 44 Miss., 654 ; Glazier v. Bailey, M. S., Oct. term, 1872.

*Sale & Dowd*, for defendant in error :

1. Forcible entry and unlawful detainer is simply an action for the possession, and does not involve the title to property. *Spears v. McKay*, Walk., 265 ; *Loring v. Willis*, 4 How., 383 ; *Buford v. Nolan*, 30 Miss., 427. The bill was filed to enjoin this proceeding. It was a proper case, therefore, for the interposition of a court of equity. *Banks v. Evans*, 10 S. and M., 35 ; *Ezelle v. Parker*, 41 Miss., 520 ; *Glazier v. Bailey*, 47 Miss., 395 ; *Huntington v. Allen*, 44 Miss., 654.

2. Plaintiff in error cannot raise questions in this court that were not made in the court below. *Ferguson v. Applenhite*, 10 S. and M., 304 ; 27 Miss., 239.

3. The judgment was conclusive against all the parties to it and their privies, and a sale under it vested such a complete legal title as to authorize the purchaser to file a bill to remove clouds upon his title. *Cocke v. Lane*, 3 S. and M., 763. The recitals in the sheriff's deed are evidence of the facts stated therein. *Ib.* Irregularities of the sheriff in advertising or conducting the sale, will not affect the title of a *bona fide* purchaser. *Minor v. City of Natchez*, 4 S. and M., 602. No irregularities in the judgment or execution will affect the title of a *bona fide* purchaser. *Doe v. Natchez Ins. Co.*, 8 S. and M., 197 ; *City of Natchez v. Minor*, 10 ib., 246 ; *Cockrell v. Wynn*, 1 S. and M., 117.

The lien of a mechanic commences from the date of his contract and not from the time he commenced to perform it; and it will be prior to all incumbrances and conveyances subsequent to the date of the contract who have notice, and the pendency of a suit to enforce the lien is notice to a subsequent purchaser or incumbrancer. *Bell v. Cooper*, 26 Miss., 650 ; 36 Miss., 19 ; *McLaughlin v. Green*, 48 Miss., 175. A purchaser at sheriff's sale gets all the rights of the judgment debtor, and may invoke in his support all the protection and defense to which the judgment debtor or cred-

---

Opinion of the court.

---

itor is entitled, being by his purchase substituted to all his rights. *Lambeth v. Elder*, 44 Miss., 80; *Cocke v. Lane*, 3 S. and M., 763.

The general policy of our law shields a *bona fide* purchaser from all liens and equities of which he had no notice. 2 Story Eq., §§ 1502-1504; 1 ib., §§ 64, 108, 119, 381, 409, 434, 630, 631; *Lambeth v. Elder*, 44 Miss., 87; *Dickson v. Green*, 24 ib., 612; 23 ib., 136.

4. Mrs. Ivey's deed from Scoggins was made on the 2d of March, 1860, when the land was in the actual adverse possession of T. J. Denton, and is therefore void. *Davis v. Herndon*, 39 Miss., 504, 505; *Brown v. Lipscomb*, 9 Port., 472; *Dunklin v. Wilkins*, 5 Ala., 199.

SIMRALL, J., delivered the opinion of the court :

The record is unnecessarily prolix and voluminous, which serves to obscure, rather than to elucidate, the real controverted issue.

Both parties trace title back to H. Woldrop as a common source.

The complainant claims through a sheriff's sale, made in 1868, to one Denton, under two judgments recovered against John Ivey, the husband of the defendant, in suits brought by a mechanic and a material man, asserting and maintaining a mechanic's lien on the premises in controversy. The successive transfers of the property are as follows: The sheriff, under the judgments to Denton, who, in 1861, sold and conveyed to Shepperd, who, in 1865, conveyed to the complainant White. The title came from Woldrop to the judgment debtor Ivey.

The defendant, Mrs. Ivey, claims title as follows: In 1857, February 28th, she and her husband conveyed to Scoggins, who conveyed to her March 2d, 1860; the latter deed was recorded April 6th, 1860, the former August 31st, 1857.

The testimony proves that Denton, and the subvendees under him, including the complainant White, have been, under their deeds, in the possession of the premises.

---

Opinion of the court.

---

The records of Chickasaw county were destroyed, or greatly mutilated and injured, by the conflagration of the court house during the late war, so that it was impossible to produce a complete transcript of the record of judgments, under which Denton purchased. It appears that these were special proceedings, claiming the mechanic's lien, which were sustained and vindicated by the judgments. Such lien extends to and takes hold of the freehold, if such was the nature of the estate, and is prior and superior to all subsequent incumbrances. *Otley v. Haviland, Clark & Co.*, 36 Miss. Rep., 37; *Buchanan & Smith v. Barksdale*, 43 Miss., 90; *McLaughlin v. Green*, 48 Miss., 202. If there be a prior incumbrance, the lien will be operative on the buildings and erections, to the exclusion of the prior lien, but not upon the land itself. (Cases cited.)

Such lien begins either from the date of the contract. *Bell v. Cooper*, 26 Miss., 650. Or from the commencement of the work on the ground towards the erection of the building. 48 Miss., 204 (*supra*). The purchaser under such special judgment, acquires the privileges and benefits of the lien, and his title relates back to the lien and is invested with its advantages, so as to defeat incumbrances or conveyances, made by the judgment debtor subsequent thereto. *Cochran v. Wimberly*, 44 Miss., 505; *Lambeth v. Elder*, *ib.*, 88. It would follow, therefore, that Denton could refer his title acquired, by the sheriff's sale and deed, back to the time when the mechanic's lien was created, and from that time it would be superior and prior to subsequent incumbrances and conveyances, suffered or made by the judgment debtor Ivey.

The contract with Armstrong, reserving the lien for lumber, is dated March 4, 1856. It is admitted that the judgments were obtained in 1856 or 1857; the precise date not known. The conveyance from Ivey and wife to Scoggins is dated February 28, 1857, who conveyed to Mrs. Ivey April 6, 1860. It is therefore manifest that the mechanic's liens are older than the title derived by Mrs. Ivey through Scoggins, and is the better title, unless its superiority should be overcome for other reasons.

## Syllabus.

Mrs. Ivey insists that her husband could not incumber the property with the mechanic's lien at all, because the purchase was made in the first instance from Woldrop with her means.

This position is hardly sustained by the testimony. It seems that the deed was made by Woldrop to Ivey at the request of White, for the reason that Ivey was the surety for White, who subsequently paid the purchase money to Woldrop.

However that may be, the legal title was in Ivey the husband, who incumbered the property for its improvement, without notice to the mechanics of the wife's claim. And there was an actual sale under judgment for these debts to Denton, who bought without notice, and conveyed to his vendee, also, without notice. Against these parties, the secret resulting trusts, if proved, could not be set up. *Boon v. Barnes*, 23 Miss., 138. No question is made by counsel, in this court, that the sheriff's sale was not made at the proper place, or that it was fraudulently conducted.

The decree is affirmed.

## CATO GARRARD v. THE STATE.

50	147
72	120
50	147
177	709

1. CONSPIRATORS—ACTS AND DECLARATIONS WHEN EVIDENCE.—The general rule universally recognized is, that a foundation must first be laid by proof, sufficient *prima facie* to establish the existence of a combination before the acts and declarations of any conspirator or accomplice can be given in evidence to charge others. 1 *Greenleaf Evid.*, 126; *Browning v. The State*, 80 Miss. Rep., 656.
2. CONFESSIONS—WHEN ADMISSIBLE.—The doctrine is well established that when a confession is induced by threats, or by a promise or hope of favor held out to the accused by the magistrate or officer making the arrest, it is inadmissible in evidence against him. 1 *Greenleaf's Evid.*, 253. But where there is a conflict of testimony as to whether the confessions were voluntary, it is a question of fact for the jury to determine.
3. SAME—SAME.—Although the entire confession cannot be received in evidence, the weight of authority is, that so much of the confession as relates strictly to the fact discovered by it, may be given in evidence, for

---

Briefs.

---

the reason for rejecting involuntary confessions is, the apprehension that the accused may have been induced to say what is false. *Belote v. The State*, 36 Miss. Rep., 96.

4. **NEW TRIALS.** — It is well settled that a new trial will not be granted for the admission of illegal evidence, to establish a fact which is sufficiently proven by other competent evidence; nor if it appears that, on another trial, a different result would not ensue, and it is manifest that justice has been done. Nor because erroneous instructions have been granted, if the verdict be clearly right according to the evidence. *Pritchard v. Myers*, 11 Smed. & Mar. R., 169; *Hand v. Grant*, 5 Smed. & Mar. R., 508.

**ERROR to the Circuit Court of Issaquena County.** Hon. C. C. SHACKLEFORD, Judge.

The opinion of the court contains a sufficient statement of the case.

*Upton M. Young and Miller & Farish*, for plaintiff in error :

1. The testimony relating to statements made by Wilson implicating Cato Garrard, although such statements were made in his presence, should have been excluded from the jury. Before the statements of codefendants can be given in evidence against each other, there must be a *prima facie* case established *aliunde*. *Browning v. State*, 33 Miss., 47. The statements of one or more conspirators are competent against the others, if the conspiracy be first established by other testimony. *Lynes v. The State*, 36 Miss., 617; *Street v. The State*, 43 ib., 1; *Roscoe Cr. Ev.*, 49, 50.

2. Evidence of confessions by the accused was improperly admitted. *Cady v. State*, 44 Miss., 333; *Peter v. State*, 4 S. & M., 31; *Rosc. Cr. Ev.*, 30; *Simon v. State*, 37 Miss., 288; *Jordan v. State*, 32 ib., 382; *Dick v. State*, 30 ib., 593; *Serpentine v. State*, 1 How., 256.

*G. E. Harris*, Attorney General for the state, contended that the verdict as sustained by the law and evidence, and the judgment should be affirmed. It has been held by this court in *Belote v. The State*, 36 Miss., 97, that "the fact that property alleged to have been stolen was found in consequence of information procured from the accused, but by improper means, is not admissible

---

Opinion of the court.

---

in evidence against him unless the property so found be identified as the property stolen. Wharton's Am. Cr. Law (2d ed.), 256; Russ. Cr., 845; Archb. Cr. Pr. & Pl. (5th Am. ed.), 140; Van Buren v. State, 24 Miss., 512; Hudson v. The State, 9 Yerg., 408. The fact of finding the goods in consequence of the confessions is proper to go to the jury with all its attendant and corroborative circumstances, including the fact of his silence when Wilson stated his connection with the crime.

PEYTON, C. J., delivered the opinion of the court:

This is a writ of error from a judgment upon a conviction of the plaintiff in error of burglary. The main questions presented by this record for our consideration involve in their solution an inquiry into the propriety of admitting testimony of the statements of one Alexander Wilson, an accomplice of the accused, not on trial, and of refusing an instruction asked by the defendant below, the plaintiff in error.

There being no proof of any combination or conspiracy between Wilson and the plaintiff, to commit the offense charged in the indictment, the statements of Wilson in regard to it, ought not to have been admitted in evidence on the trial of the accused. Wilson, although an accomplice, was a competent witness, and his statements could only affect himself. He was a codefendant in the indictment with the plaintiff, and before his statements could be given in evidence against the plaintiff, there must be a *prima facie* case established by evidence *aliunde*. A foundation must first be laid by proof, sufficient *prima facie* to establish the existence of a combination, before the acts or declarations of any conspirator or accomplice can be given in evidence to charge others. This, as a general rule, seems to be universally recognized. 1 Greenl. Ev., 126, sec. 111, and Browning v. The State, 30 Miss., 656.

When tested by this rule, it is manifest that the court erred in admitting the statements of Wilson as evidence in the cause; there



---

Opinion of the court.

---

having been no foundation laid by proof, establishing or tending to establish the existence of a conspiracy or combination by him and the party on trial to commit the offense charged.

The refusal to give the third instruction asked by the plaintiff is error. In that instruction, the court was asked to charge the jury, that statements made by Wilson are not evidence against the accused, unless the jury believe from the evidence that said Wilson and the accused conspired to commit the offense charged, and that such statements were made before the crime was committed. This announces a correct principle of law, and should have been given to the jury.

Joe Conger testified that Cato Garrard, Alexander Wilson and himself were, by Henry Hilliard, the officer that arrested them, carried before one Leon, a justice of the peace, who said to the accused (Cato Garrard) that if he would tell him all about the matter, he would let him off. And Sam Jones testified that he was at Leon's when the accused was brought there for examination, for breaking into Steele & Co's store, and taking therefrom the goods in November, 1871, and heard Leon say to Cato, "I suspect you, and you had better tell all about it, if you want to get off." Then Cato said that he and Wilson had broken open the store and taken the things out to divide.

If it be true that these inducements were held out by the magistrate to the accused to confess, his confession would be clearly inadmissible against him upon his trial. There are three kinds of confession: 1. A confession in open court of the prisoner's guilt, which is conclusive, and renders any proof unnecessary. 2. The next highest kind of confession is that which is made before a magistrate. 3. The lowest is that which is made to any other person, and requires to be sustained by proof of corroborating circumstances.

The doctrine is well established, that when a confession is induced by threats or by a promise, or hope of favor, held out to the accused by a magistrate or by the officer making the arrest, it

---

Opinion of the court.

---

is not admissible in evidence against him. *The State v. Bostick*, 4 Harrington, 563, and *Commonwealth v. Taylor*, 5 Cusb., 605. A confession to a magistrate, who told the accused beforehand that it would be better for him to make a full confession, is not admissible. *People v. Ward*, 15 Wend., 231; 1 Phillip's Ev., 5 Am. Ed., 445, top page; and 1 Greenl. Ev., 253, sec. 222.

But against the testimony of these two witnesses, is that of Henry Hilliard, the officer who had the accused in custody, who testified that Cato Garrard and Joe Conger were taken by him before Esquire Leon, a justice of the peace, and then Cato Garrard confessed, without any promises or threats being made by said justice, that he and Wilson had broken open the store and taken the things out. This conflict of testimony raises a question of fact, as to whether any inducement was held out to procure the confession, and that question was very properly left to the jury to decide.

Hilliard further testified that some of the things were found, where Cato said they were. And the things spoken of by the witness were evidently the stolen goods taken from the store, for which Cato was then in custody and about which the examination was then being had. This was undoubtedly legitimate evidence, even though the confession may have been improperly obtained. For the object of all the care which is taken to exclude confessions which are not voluntary, is to exclude testimony not probably true. But where in consequence of the information obtained from the prisoner, the property stolen or any other material fact is discovered, it is competent to show that such discovery was made conformably to the information given by the prisoner. The statement as to his knowledge of the place where the property or other evidence was to be found, being thus confirmed by the fact, is proved to be true, and not to have been fabricated in consequence of any inducement. 1 Greenl. Ev., 262, sec. 231.

And although the entire confession cannot be received in evidence, the weight of modern authority is, that so much of the

---

Opinion of the court.

---

confession as relates strictly to the fact discovered by it may be given in evidence; for the reason, as before stated, of rejecting such confessions is the apprehension that the accused may have been induced to say what is false, but the fact discovered shows that so much of the confession as immediately relates to it, is true. It is, therefore, well settled upon reason, principle and authority, that it is competent to show that the witness was directed by the accused where to find the goods, and that they were found there accordingly. *Belote v. The State*, 36 Miss., 96.

If the confession of the accused was voluntary, which led to the discovery of part of the goods stolen, there can be no reasonable doubt that the conviction was right. And had the court rejected the statements of Wilson, and given the instruction asked by the accused, the result must properly have been the same.

But whether there was any inducement held out by the magistrate to make the confession, was a fact within the province of the jury to decide, and their finding, under the charge given them by the court on behalf of the accused, "that confessions made by the prisoner under the influence of a promise or hope of reward held out to him by the person having him in custody, are not competent evidence to convict him of the crime so confessed, unless there is other evidence sufficient to satisfy the minds of the jury of the guilt of the accused," that the accused was guilty of the crime charged in the indictment, justifies the belief that they found the confession was voluntarily made. This must have been so. The verdict of the jury cannot be accounted for upon any other hypothesis, unless they believed that the other evidence was sufficient to establish the guilt of the accused. The instruction thus given for the accused cured the errors in admitting Wilson's statements in evidence, and the refusal of the third instruction asked by the accused. The instruction given was substantially the same as that refused, and must have destroyed the effect which Wilson's admissions and statements might have had upon the minds of the jury, if that instruction had not been given to them.

---

Syllabus.

---

Upon the whole, we think the conviction was right upon the evidence. It has been repeatedly held that a new trial will not be granted for the admission of illegal evidence to establish a fact, which is otherwise sufficiently proven by other and competent evidence, nor if it appear that on another trial, there is little reason to believe that the result would be different, and it is clear that justice has been done. *Hand v. Grant*, 5 S. & M., 508, and *Ford v. Williams*, 6 George, 533. Nor will a new trial be granted because of a refusal to give a correct instruction, if the verdict be clearly right according to the evidence, and should not have been different, if the instruction had been given. *Pritchard v. Myers*, 11 S. & M., 169; *Wiggins v. McGimpsey*, 13 S. & M., 532, and *Holloway v. Armstrong*, 1 George, 504.

The judgment is affirmed.

---

JAS. F. CUMMINGS et al. v. A. A. OGLESBY.

1. **ASSIGNMENT OF A NOTE BY A VENDOR TRANSFERS THE LIEN.**—The assignment of a note by a vendor of land transfers *pro tanto* the security which vendor had for its payment. *Tanner v. Hicks*, 4 Smed. & Mar. Reps., 294. If the land is conveyed to an innocent and *bona fide* purchaser, the vendor who held the legal title as security, as well for his assignee as for himself, becomes thereby trustee for his assignee, and if he be faithless and destroy the lien on the land, he is still liable as trustee for the purchase money which he has realized. *Pitts v. Parker*, 44 Miss. R., 252; *Terry et al. v. Woods et al.*, 6 Smed. & Mar., 149; *Parker v. Kelly*, 10 Smed. & Mar., 191.
2. **ASSIGNMENT OF PURCHASE MONEY.**—An assignment of the purchase money or any part of it, invests the assignee with all the rights of the vendor. It cannot be displaced but by some act of the assignee. It may be postponed in favor of an innocent purchaser, without notice, who has parted with value.

---

Opinion of the court.

---

APPEAL from the Chancery Court of Panola County. Hon. J. F. SIMMONS, Chancellor.

The opinion of the court contains a sufficient statement of the case.

*Harris & George, R. W. Crump and Miller & Miller*, for appellants, contended that the note formed no part of the consideration for the land and was, therefore, not a lien upon it. It is always competent to show the true consideration, and even a different one from that expressed on the face of an instrument. 3 Para. Cont. (5th ed.), 14. Smith on Contracts (4th ed.), 43. Our statute does not require the consideration to be expressed; hence it is not a violation of the statute of frauds to show the true consideration. 4 S. & M., 91. 34 Miss., 173. 45 ib., 129. *Patterson v. Edwards*, 29 Miss., 67. The lien which is the incident of a note given for land grows out of the peculiar relations of vendor and vendee; and there must exist between them the relation of debtor and creditor as to the note. 25 Miss., 88. 44 Miss., 247. Revised Code of 1871, § 1086. The agreement therefore had the effect to supersede the lien. If the vendor of land, who executes a deed, assigns the note for the purchase money, it is well settled that no lien passes, and that if a vendor who has only given bond for title, assigns the note, and afterwards makes a deed, the assignee may still proceed against the land, his security being affected by the conveyance. The mere act of conveying to Cummings did not damage or affect Oglesby; his security remained the same. *Parker v. Kelly*, 10 S. & M., 184. *Walker v. Jeffries*, 45 Miss., 160.

Reporters find no brief in the record for appellee.

SIMRALL, J., delivered the opinion of the court:

Jackson sold to Cummings a quarter section, on the 17th of January, 1870, retaining the title until payment of the purchase money.

The controversy grows out of the connection of Oglesby with

---

Opinion of the court.

---

the sale, and with the assignment of the first note for \$1,200 to him. It is contended by the appellants, that Oglesby advanced the first payment on the land, and took the note of Cummings, with Jackson's indorsement without recourse, as a memorandum, or evidence of Cummings' indebtedness to him, for the money advanced for him to Jackson, thereby disconnecting that note from the land trade, as representing a part of the purchase money.

Oglesby maintains, that the note was indorsed and transferred to him, with the same benefit of security, upon the land, as it would have had in the hands of Jackson.

Jackson conveyed the land to Cummings, whilst the note was outstanding in the hands of Oglesby, and with positive knowledge that it was unpaid; and on the day after, Cummings sold and conveyed to Mrs. Parish for a price paid in cash, several hundred dollars more than he agreed to pay, to Jackson. If the theory of the case put forward by Oglesby be correct, and has been established by evidence, then a gross fraud has been practiced upon Oglesby. The chancellor was of opinion and so determined, that Oglesby had sustained his case by the evidence. Was that conclusion wrong?

The depositions of the witnesses, those that seem to us to give the most probable and reliable account of the matters in controversy, considered in connection with the written documents, furnish an easy solution of the disputed points.

Jackson desired to get for his land \$1,200 cash, and \$1,200 twelve month thereafter. Cummings could not raise the money for the cash payment. Oglesby being a man of some wealth and a lender of money, agreed for the accommodation of Cummings, to assist in the consummation of the trade with his money. The payments were secured (as appears in Jackson's bond) by one note for \$1,200 at ten per cent. interest from date, payable 1st January, 1871, and a note for the like sum due 1st January, 1872, at six per cent. interest for the first year, and ten per cent. thereafter. The title, bond and notes were dated the 17th of January, 1870.

---

Opinion of the court.

---

The purpose of Jackson was to realize \$1,200 in hand and the like sum a year thereafter. How that should be accomplished is manifested by a writing dated the 11th of January, 1870, signed by Jackson, Cummings and Oglesby. After stating that Cummings was to make his two notes, of the term and maturity above specified, it is recited that Oglesby agrees to cash the first note at five per cent. discount, the discount to be paid by Cummings, and Oglesby agrees also to indorse on the second note that he will cash the same on the 1st January, 1871, at the face of said note.

The first note, in its body, contains the statement that it was for the first payment of the quarter section of land, and was indorsed thus: "For value received I transfer and assign the within note to A. A. Oglesby without recourse on me." Signed J. R. Jackson.

It is impossible to put any other construction on these papers, than that Oglesby was to use his money to buy or discount the note, so as to enable Jackson to get his cash payment; and that the second instalment might not be postponed longer than twelve months, he agreed at that time to pay the face for that note. It is in evidence that Oglesby was applied to, because he had moneyed means, and used it in loans, and that he participated in the trade after another person, who was also a capitalist, had declined. It is shown that Cummings was a comparative stranger to Oglesby, and that the latter was under no special obligation to do him a favor. Oglesby was willing to advance his money, because he thought the land was worth fully the price agreed to be given, and was an ample security. This exposition arising upon the face of the papers is borne out by the testimony of Oglesby and Halpin, and partially by Crump. The latter thinks that he told Oglesby that the land was security for the note. Halpin, who held the note for collection for Oglesby, states that about a month before the note was due, Jackson and Cummings called upon him and examined the note. Cummings submitted an offer to pay the face of the note, and desired Halpin to write that proposition to

---

Opinion of the court.

---

Oglesby, who was in California; he also proposed if Oglesby would accept that offer, he would also pay off the second note at the same time. Cummings also said, that although the note was well secured, if Oglesby declined his propositions, he must get his money at the end of the law. Cummings proffered to deposit the money with a merchant in Lardis, to await an answer from Oglesby. Shortly after this Halpin informed Cummings that he had authority to accept his offer.

It would be hard to resist the conviction that both Jackson and Cummings knew that Oglesby looked to the land as security, and that they were willing for any pretext, to defeat and destroy it. Nor can it be well doubted that both Jackson and Cummings were privy to the plan by which the sale should be made and title conveyed to Mrs. Parish, who was ignorant of Oglesby's equity.

The transfer of the note by Jackson to Oglesby, transferred also *pro tanto* the security which Jackson held for its payment. *Tanner v. Hicks*, 4 S. & M., 294. That security might have been enforced by Jackson. *Ib.* But so soon as Jackson was paid the last instalment retained by himself, he conveyed to Cummings. Manifestly the land in Cummings' hands would have been liable to Oglesby's equity. But he conveyed to Mrs. Parish, an innocent and *bona fide* purchaser. In such circumstances, Jackson, who held the legal title as security as well for his assignee, Oglesby, as for himself, became thereby trustee for Oglesby. And if he has been faithless, and has destroyed the lien on the land, he ought to be still held trustee for the purchase money which he has realized, and be required to make the complainant sound and whole by paying him the value of the security.

Cummings was an equal participant with Jackson, perhaps the guiltier of the two (since he reaped the benefit) in the acts which defeated the lien, and should share in the responsibility. The nature and efficacy of the lien upon which Oglesby advanced his money is described in *Tanner v. Hicks*, 4 S. & M.; *Terry et al.*



---

Syllabus.

---

v. Woods et al., 6 S. & M., 149; Parker v. Kelly, 10 S. & M., 191, and Pitt v. Parker, 44 Miss., 252. It is in effect like conveying the title and taking security by mortgage. An assignment of the purchase money, or any part of it, invests the assignee with all the rights of the vendor. It cannot be displaced but by some act of the assignee. The assignor cannot release it. It may be postponed however in favor of an innocent purchaser, who has parted with value and had no notice, which was the predicament of Mrs. Parish.

The decree is affirmed.

---

## NICHOLAS BAKER et al. v. H. M. GRIFFIN.

- 50 158  
81 657  
81 662
1. CHANCERY COURT—PRACTICE—VENDOR AND VENDEE.—In December, 1868, G. sold and conveyed to H. two tracts of land, by deed, absolute on its face; H. paid cash, \$400, and gave his notes for \$800. In 1869 H. sold and conveyed one of these tracts of land to L., by deed absolute on its face. Payment to H. was secured only by the notes of L. who had notice that H. was still indebted to G. for this land. In March, 1870, H. and wife, with the consent and approval of L. executed a trust deed on both these tracts of land, to secure to G. the purchase money due him from H. L. agreed to join in this deed, but did not. Afterwards L. sold and conveyed the one tract to B. The latter did not make a search in the clerk's office for conveyances or incumbrances and had no notice in fact of the trust deed. Was B. a *bona fide* purchaser from L? Held, that he was.
  2. SAME—CANCELLATION OF DEEDS.—On a bill filed by G. against H. L. & B. to cancel all the conveyances, it appearing that H. was still indebted to G. and L. to H. and B. to L., though the particular relief sought was refused as to B. G. was allowed to retain his bill with a view to retain to himself the balance of purchase money due from B. to L. Dodge v. Evans, 48 Miss., 570.

APPEAL from the Chancery Court of Choctaw County. Hon. D. P. COFFEY, Chancellor.

The bill of Hardy M. Griffin, complainant below, shows:

---

Statement of the case.

---

That, in the latter part of 1868, he sold and conveyed the following lands to J. W. Hill, to wit: North half of southwest quarter of section three, township nineteen, range eleven east, together with other lands, for \$1,200, the receipt of which sum is acknowledged in the deed of conveyance, but only \$400 was paid. Said deed of conveyance was never recorded. In February, 1869, said Hill sold said north half of southwest quarter, section three, township nineteen, range eleven east, and conveyed the same to H. M. Logue, defendant below, for the sum of \$400, the receipt of which sum is acknowledged in the deed of conveyance; but a small portion of the purchase money was not paid until some time after March 13, 1870, said J. W. Hill conveyed all of said lands bought by him from said Griffin, as aforesaid, by deed of trust, to Samuel Deloach, as trustee, for the benefit of said Griffin, and to secure to him the purchase money on said lands. And in this deed of trust, the said Hill conveyed said north half of southwest quarter, section 3, township nineteen, range eleven east, which he had conveyed to said Logue, more than a year before that time, and which had never been reconveyed to said Hill. Said Logue sold and conveyed said land, last above mentioned, to Nicholas Baker defendant below, for \$600, but there is a clerical error in the statement of the numbers in the deed from Logue to Baker.

After the sale and conveyance of said land to Baker, said trustee sold the same under said deed of trust, and said Griffin bought it.

Said bill alleges title in the said lands, both by virtue of a vendor's lien for purchase money and through said deed in trust to secure said purchase money.

And proofs for a cancellation of the titles of Baker and Logue, defendants below, as clouds upon the title of said Griffin.

To this bill defendants below demurred, but their demurrer was overruled, and complainant below by leave of court, filed his amended bill, stating about the same material facts.

Upon final hearing the chancellor made a decree cancelling the

---

Opinion of the court.

---

titles of said Baker and Logue, and declaring them null and void.

From which decree defendants below appeal.

The following are the assignments of error:

1. The chancellor erred in overruling the demurrer of defendants below.
2. The chancellor erred in cancelling the title of Nicholas Baker.
3. The chancellor erred in decreeing the cancellation of the title of H. M. Logue from J. W. Hill, and in decreeing the subsequent title of Hardy M. Griffin for the amount to the same.

*Frank A. Critz*, for appellants.

*Dennis & Pilcher*, for appellees.

TARBELL, J., delivered the opinion of the court.

In December, 1868, H. M. Griffin sold and conveyed several tracts of land to J. W. Hill in consideration of \$1,200, of which Hill paid cash \$400. and gave his notes for \$800. The deed contained covenants of warranty, and was absolute on its face.

Hill sold and conveyed to H. M. Logue, in February, 1869, a part of said lands for the sum of \$400, secured by the notes of Logue. This deed contained covenants of warranty and was absolute on its face. Logue made this purchase and accepted the conveyance with full knowledge that, except the payment of \$400, the purchase money due from Hill to Griffin remained unpaid.

On the 15th day of March, 1870, Hill and wife executed a deed of trust to Samuel Deloach, trustee, upon all the lands conveyed by Griffin to Hill (including the portion conveyed by Hill to Logue), to secure to Griffin the unpaid purchase money due thereon, which deed contained the usual conditions of sale in default of payment. This deed of trust was executed with the full knowledge, consent and approbation of Logue, who agreed to sign the deed with Hill, but failed to do so. This deed was duly recorded.

---

Opinion of the court.

---

Logue, on the 14th day of September, 1870, sold and conveyed the part of said lands, conveyed to him by Hill, to Nicholas Baker, for \$600, of which Baker paid about one half in cash, and received a deed with covenants of warranty. At the date of this transaction, Baker had no actual knowledge of the trust deed, though it was recorded at length in the proper clerk's office. He heard of the deed soon after his purchase, and refuses to make any further payments until the determination of this proceeding.

On the 25th day of January, 1871, Samuel Deloach, the trustee, proceeded to sell the lands conveyed to him by Hill and wife, according to the conditions of the deed and the requirements of law. Upon the sale, Griffin, the *cestui que trust*, being the best and highest bidder, became the purchaser of the lands, and received a deed from the trustee, which was duly recorded.

Upon this state of facts, Griffin filed his bill in the chancery court of Choctaw county, praying the cancellation of the deeds from Hill to Logue and from Logue to Baker, and for such other and general relief as he might be entitled to on the facts.

The chancellor sustained the prayer of the bill, and decreed the deeds named to be canceled.

Thereupon, Logue and Baker appealed to this court. It is assigned for error, that the court erred in overruling the demurrer of the defendants to the original bill; in decreeing the titles of Logue and Baker to be canceled; and in holding the title of Griffin to be paramount.

There was a demurrer to the original bill, which was overruled, when the complainant filed an amended bill, to which the defendants answered fully. A thorough examination of all the parties and witnesses followed, resulting in the development of the facts above stated.

It will be observed that Griffin conveyed to Hill two tracts of land, by deed absolute on its face. Payment was secured only by the notes of Hill. One of these tracts Hill conveyed to Logue, by deed, also absolute on its face. Payment to Hill was secured

---

Opinion of the court.

---

by the notes of Logue, who had full knowledge that Hill was still indebted to Griffin for this land. After the conveyance of one tract to Logue, Hill, with the consent and approbation of Logue, executed to Griffin a deed of trust, in which he included the tract he had conveyed to Logue, to secure to Griffin, the original vendor, the purchase money due him from Hill. All these deeds were duly recorded.

After the deed of trust, Logue sold and conveyed to Baker, with assurances that he had the legal, unincumbered title, and good right to convey. Baker did not examine the records in the clerk's office, and had no actual notice of the trust deed. Was Baker a *bona fide* purchaser, and is he entitled to the protection of the courts?

Curtis v. Blair, 26 Miss., 309, is cited to show that the parol authority of Logue to Hill to execute the deed of trust was legal and binding. The argument is, that the statute of frauds is satisfied if the contract for the conveyance of the land be in writing and signed by the agent authorized to act therein, but that the statute does not require that the appointment of the agent to make the "note or memorandum in writing," should be in writing, nor that the signature should be in the name of the principal. (9 Leigh., 387; 6 Ad. & El., 486; 33 Eng. C. L. R., 122; Story on Agency, § 270.)

It must be conceded, without discussion, that Logue was without defense. As to him, Griffin's claim was paramount in which-ever mode it might be presented, whether the latter relied solely upon his rights as an unpaid vendor, of which Logue had full knowledge, or upon the trust deed, in the rather circuitous and unusual mode adopted, tending rather to complicate, than to simplify the enforcement of his equity.

As to Baker, however, he stands in an attitude quite different from that of Logue.

Suppose Baker to have sought the records of the county clerk's office, he would have found an absolute, unconditional conveyance

---

Opinion of the court.

---

from Griffin to Hill, and the like from Hill to Logue. Looking for incumbrances, he would have found none by Hill, while the title stood in his name; nor by Logue, while the title was in him. Beyond this he was not bound to search. He would, then, have found a connected title from Griffin to himself, without any incumbrances by any of these parties while holding the legal title.

The rule upon this state of facts is understood to be, that the purchaser of the legal title is not bound to take notice of a registered lien or incumbrance of an estate, created by any person other than those through whom he is compelled to deraign his title. *Harper v. Bibb & Hopkins*, 34 Miss., 472.

This just and sensible rule is very fully and at length discussed and illustrated, in *Basset v. Nosworthy*, 2 Leading Cas. in Eq., note, pp. 67-127.

The view sought to be presented may be further enforced by another theoretical case, though one not unfrequently occurring in practice. Suppose Griffin to have conveyed the lands in question at one date, by a deed absolute on its face, to A., and, at a later date, by another deed, also absolute, to B., both of which deeds were duly recorded. Can there be any doubt that a third party might take title from A. without hesitation, and in defiance of the conveyance to B.?

In this connection, *Curtis v. Blair*, to which reference has been made, may be more fully stated. *Curtis* was the owner of lands. *Pinson* was his agent. *Blair* for himself, and *Crawford & Ayres* jointly, were negotiating with *Pinson* for these lands, belonging to *Curtis*. Terms were agreed on between *Pinson* and *Blair*, but when *Blair* tendered performance *Pinson* declined. Subsequently, *Pinson* sold the lands to *Crawford* and *Ayres*. *Blair* thereupon filed a bill for specific performance and to cancel the sale to *Crawford & Ayres*. Upon this branch of that case, the court say (26 Miss., p. 327), "With much greater reason is he not entitled to have the sale to *Crawford* and *Ayres* vacated. They purchased the land from *Pinson*, after the failure of *Blair* to perfect the sale.

---

Opinion of the court.

---

They had previously been informed of Blair's negotiation for the land by Pinson, and evinced anything else but a disposition to interfere with it. They were, however, afterwards informed by Pinson that Blair had failed to complete the purchase, and acting in faith of that assurance, they became the purchasers. If it be said that they had notice from Pinson of Blair's negotiation or purchase, or sufficient to put them on inquiry, and ought by reason of that information, to have satisfied themselves that Blair had no right to the land, they also had notice from the same source that Blair's purchase had failed. They were as well justified in acting on the latter information as in the former; and under the circumstances, they were not required to seek for the information than that last derived from Pinson. It would not, therefore, be equitable to cancel the purchase which they have *bona fide* made; and a due regard for their equities would incline us to assist Blair to his remedy at law, if he has any, for the alleged breach of contract on the part of Curtis, rather than to compel a specific performance against Curtis, and deprive Crawford and Ayers of the benefit of their purchase."

Upon a vital branch of the case at bar, therefore, the doctrine of Curtis v. Blair, in its application to the rights of Baker, holding him to be a *bona fide* purchaser, is fatal to the claim of Griffin to a cancellation of the deed from Logue to Baker. The latter can certainly complain that the decree of the chancellor to him was unjust and erroneous.

The decree will be reversed but the bill may be retained to enable Griffin to proceed with a view to secure to himself, if he shall be so advised, the benefit of the balance of purchase money due from Baker to Logue. Dodge v. Evans, 43 Miss, 570.

Decree reversed and cause remanded.

## Statement of case.

## VICTOR CACHUTE v. THE STATE

50	165
280	23
480	24

1. **CRIMINAL TRIAL — INDICTMENT — HOW PRESENTED INTO COURT.** — The authorities in this state are, that the indictment must be brought into court, by the grand jury, as a body or through their foreman, accompanied by the requisite number, and the record must show this affirmatively. *Laura v. The State*, 26 Miss., 176; *Friar v. The State*, 3 How., 423; *Goodwin v. The State*, 4 Smed. & Mar., 585.
2. **SAME — SAME — ENTRY BY THE CLERK.** — It is not competent for the clerk to certify by way of recital what transpired at a former term of the court. The proceedings of that term as actually entered upon the records of the courts, are the best and only evidence of what occurred in a particular case.
3. **SAME — EFFECT OF § 2794 AND 2795 OF CODE OF 1871.** — The first section of this statute recognizes the practice that the minutes of the court must show that the bill of indictment was brought by the grand jury into court. The second section postpones such entry upon the minutes until the accused has been arrested and is either in custody or at large on bail. The object was to keep the indictment secret until the accused was arrested. Manifestly, this statute does not dispense with a record upon the minutes, of the fact, either at the term at which the indictment was found or at any time "after the appearance of the accused."
4. **ARRAIGNMENT — PLEA.** — In all cases of felony the record *must* show affirmatively, that the accused was arraigned and plead in person to the indictment. If plea is by attorney, it is as no plea. *Wilson v. The State*, 42 Miss., 641.

**ERROR to the circuit court of Harrison county. Hon. ROBERT LEACHMAN, Judge.**

The plaintiff in error was indicted at the April term, 1869, of court below for an assault upon one Sandy Woods with intent to kill. At the following October term he was tried and convicted of assault and battery. The testimony in substance is as follows: Woods had threatened on several occasions, for some real or pretended offense or indignity imposed on him by the accused, to shoot him, and these threats were communicated prior to the alleged assault to the accused. The assault was made in a public



---

Statement of the case.

---

street, in the presence of several witnesses, all of whom testify that the first words and the first and only blow were by the defendant. The defendant charged Woods with having "talked about him," which Woods replied "was a d—d lie." Whereupon the defendant struck a blow at Woods with his fist, which blow was parried by Woods, who, upon being struck, attempted to snatch a heavy stick from the hands of a bystander, as a means of defense, but failed. Defendant, immediately after the attempt by Woods to seize the stick, pulled a pistol from his pocket, a two barreled pistol, and fired at Woods, inflicting a painful and dangerous wound.

The indictment in effect charges that the accused "with a certain pistol, which said pistol was then and there a deadly weapon, loaded and charged with gunpowder and one leaden bullet, in and upon one Sandy Woods then and there being, feloniously, wilfully and of his malice aforethought, did make an assault, and he the said Victor Cachute, the said pistol so loaded and charged as aforesaid, at and against the said Sandy Woods, then and there being, did then and there feloniously, wilfully, and of his malice aforethought, shoot and discharge with intent in so doing, then and there and thereby feloniously, wilfully, and of his malice aforesaid, to kill and murder the said Sandy Woods, contrary to the form of the statute, and against the peace and dignity of the state of Mississippi."

After conviction and sentence, defendant moved the court to arrest the judgment for the following reasons :

1. Because the indictment fails to charge that the defendant committed an assault and battery upon Sandy Woods with a deadly weapon with intent to kill and murder.
2. Because there is no crime known to the common law charged in said indictment except a mere assault.
3. Because the verdict is not responsive to the crime or offense charged in the indictment.
4. Because there is no offense charged or made out against the

---

Briefs.

---

defendant under section 8 of article 18, Rev. Code of 1857, p. 575; and for various other defects to be shown, etc.

The motion in arrest of judgment was overruled, and the defendant moved the court for a new trial on the grounds that the verdict was contrary to the law and the evidence; that the court erred in its instructions to the jury; and that the verdict is virtually an acquittal of the offense charged. The case comes here by writ of error.

*Harris & George*, for plaintiff in error:

1. It does not appear that the indictment was presented to the court by the grand jury in the form required by law. Rev. Code of 1857, p. 614, art. 257; *Pond v. The State*, 47 Miss., 39. The fact must appear affirmatively of record. *Greeson v. The State*, 5 How., 33; *McQuillen v. The State*, 8 S. & M., 587; *Green v. The State*, 28 Miss., 687; *Dyson v. State*, 26 ib., 362.

2. The record shows no appearance, arraignment, nor plea; and this defect is certainly fatal. Arraignment cannot be waived by the accused in cases of felony. *McQuillen v. The State*, 8 S. & M., 587; *Wilson v. The State*, 42 Miss., 652.

The statute of jeofails cannot cure these defects. The Code, p. 622, cannot be applied to them, and the verdict which under the statute is considered as curing defects of any kind, is clearly a verdict upon the plea of not guilty. Here the verdict is a nullity because it does not appear to be on an issue at all.

*G. E. Harris*, Attorney General for the state.

1. The defense in the court below seems to have proceeded upon the theory of self-defense, predicated upon the prior threats of Woods to take the life of the accused, which, though proved to have been communicated to the accused, fall far short of furnishing a sufficient justification of the defendant's act. It is not enough that the party makes a threat against the life of another, and arms himself for the purpose of executing such threat, to justify the latter in slaying or attempting to slay the former. In cases of homicide, the rule is stated to be, that the bare fear of

---

Opinion of the court.

---

danger or great bodily harm, unaccompanied by any overt act indicating a present intention to kill or injure, will not warrant a person in killing another. There must be *actual danger at the time*. Dyson v. The State, 26 Miss., 362; Cotton v. The State, 31 ib., 504; Price v. The State, 36 ib., 531; Morris State Cases, 1179, note; Head v. The State, 44 ib., 731; Edwards v. State, 47 Miss., 582; Newcomb v. The State, 37 Miss., 383; State v. Scott, 4 Ired., 415.

2. Some of the instructions asked by accused and refused may have been correct rules of law and applicable to the facts of the case. But the verdict being manifestly right on the evidence, and the true principles of law are contained in the instructions granted, this court will not disturb the judgment. Head v. The State, 44 Miss., 752.

3. The indictment is framed under our statute, and does not depend upon the common law for a description of the offense charged. Rev. Code of 1857, p. 575, art. 18; Code of 1871, § 2497. The indictment in charging the offense pursues the exact language used in the statute, and is therefore sufficient. Sarah v. The State, 28 Miss., 267; also 13 S. & M., 468. The indictment in the case at bar is sufficient under the common law, as established by the precedents. See Archbold Cr. Pr. & Pl. (10th Lond. ed.), 446, 447; 2 Bishop Cr. Prac., 652.

4. The verdict is sufficient. If the evidence does not sustain the particular intent charged, the jury may find the defendant guilty of a simple assault, or simple assault and battery. 2 Bish. Cr. Pro., 660, note (2d ed.); 1 Bish. Cr. Law, 807; 9 Ind., 363; 11 Tex., 120; 39 Me., 68; The State v. Burns, 8 Ala., 313; Mooney v. The State, 33 ib., 419; The State v. Phinney, 42 Me., 384. See also 2 Bish. Cr. Pro. (2d ed.), 641 et seq; Gipson v. State, 38 Miss., 295; Rev. Code 1857, art. 305, p. 622.

SIMRALL, J., delivered the opinion of the court:

It is assigned for error first, that the record does not show that

---

Opinion of the court.

---

the bill of indictment was presented to the court in the manner required by the statute.

All prosecutions must be conducted in the name and by the authority of the state. The appointed mode to bring offenders against the law to trial in the circuit courts is, to make a specific charge against them, in an indictment preferred by a grand jury, and by it returned into court.

It becomes important, therefore, to prevent fraud and imposition upon the court, in the initiation of prosecutions without proper authority, that the records should show that the accusation was made by a grand jury constituted as the law provides, and that the bill of indictment was brought by it into court, received and filed and thereby made a record of the court. Both the minutes of the court and the indictment constitute the record of a regular legal prosecution. The office of the former on the point we are considering, is to identify the indictment preferred by the grand jury, with the one upon which the arraignment, plea, trial, verdict and judgment were had.

The authorities are that the indictment must be brought into court by the grand jury as a body, or through their foreman, accompanied by the other jurors, or the requisite number. And the record must show this affirmatively. The cases are numerous. *Laura v. State*, 26 Miss., 176; *Friar v. State*, 3 How., 423, 4; *Goodwin v. State*, 4 S. & M., 535.

The amended transcript sent up in response to the writ of certiorari shows a proper organization of the court and of the grand jury, at the October term, 1869, of the Harrison circuit court. The original transcript contains in the caption, only the organization of the court at that term. Then immediately follows this recital: "Be it remembered, that heretofore, to wit, on the 22d of April, 1869, an indictment was filed in said court, in the words and figures following: *having been returned into court by the grand jurors in and for said county at the April term thereof, 1869.*" Then follows a copy of the indictment and indorsements thereon.

---

Opinion of the court.

---

The only evidence that the grand jury presented the indictment in court at the April term, 1869, is the recital of the clerk, made at the next succeeding term. But it is not competent for the clerk to certify, by way of recital, what transpired at a former term of the court. The proceedings of that term, as actually entered upon the records of the court, are the best and only evidence of what occurred in a particular case, with the single exception hereinafter referred to.

If authority were needed on so plain a point, it is supplied by the case of *McQuillen v. State*, 8 S. & M., 596. The question then was, whether the defendant had been arraigned and plead. The entry was in these words: "This day came the plaintiff, by F. Anderson, district attorney, and the defendant in his own proper person, and the defendant having been arraigned at *the last term* of this court, and pleaded not guilty, etc." "It was incompetent, says the court, for the clerk to make any entry of what had transpired at a former term. The consequence is that it does not legally appear that the accused was ever arraigned." See also *Pond v. State*, 47 Miss., 41.

How is the question affected by §§ 2794 and 2795 of the Code of 1871. The former declares that all indictments must be presented to the court by the foreman of the grand jury, \* \* in the presence of at least twelve of such jury, including the foreman. \* \* The latter provides that "No entry of an indictment found shall be made on the minutes of the court, at the term at which the same is found, unless the defendant is in actual custody or on bail. \* \* But such entry may be made in the minutes of the court at any time after the appearance of the defendant."

The first section recognizes the ancient practice: that the minutes of the court must show that the bill of indictment was brought by the accusing grand jury into court. The second postpones such entry upon the minutes until the accused has been arrested and is either in custody or at large on bail or recogni-

---

Opinion of the court.

---

zance. The purpose was to keep the indictment secret until after the arrest. Manifestly the statute does not dispense with a record upon the minutes of the fact, either at the term at which the indictment was found, or "at any time after the appearance of the accused," as the circumstances may be.

The defect in this transcript is, that it does not appear that an entry upon the minutes of the return of the indictment into court by the grand jury was ever made.

If the accused was neither in custody nor on bail at the April term, when the indictment was found, then it would be proper to omit a notice on the minutes of that term, of the action of the grand jury. But at some subsequent term, "after the appearance of the defendant," such an entry ought to have been made.

The recital which we have quoted, introductory to the copy of of the indictment and the indorsements upon it, does not purport to be transcribed from the minutes of the court. In legal effect, the matter of it resided in the breast of the clerk, and there was no memorial of it on the record of the October term.

To have satisfied the 2795th section, the minutes ought to have contained, at the October term, a statement of the style of the case, and then an entry that the grand jury, at the April term, had returned into court, and through their foreman presented the bill of indictment, which, with its endowments, is as follows, and that this entry was not made at the April term, because the defendant was not then in custody, or under bail or recognizance. We do not present this as the form of the entry, but as setting forth what would be a substantial compliance with the law.

The statute intends the indorsements upon the indictment and the date of its filing, as furnishing sufficient evidence to justify such an entry upon the minutes of the court at a subsequent term.

There is not the sufficient and *competent* evidence demanded by the law, that the indictment upon which the plaintiff in error was tried, was returned into court by the grand jury at the April term, 1869.

---

Statement of the case.

---

The second assignment of error is also well made. It does not appear that the defendant was arraigned and pleaded to the indictment. This is absolutely necessary in cases of felony. McQuillen's case, 8 S. & M., 596. The plea must be in person, and not by attorney; if by attorney, it is no plea. Wilson v. State, 42 Miss., 641.

The palpable and frequent defects in the record of this trial, suggest the repetition of the observation which we have more than once made, that it is a reproach to those connected with the administration of criminal justice in the circuit courts, that they do not see to it that proper entries are made upon the minutes of the court of those things in the history of the cause required by law.

The judgment is reversed, and the indictment quashed.

---

P. O'LEARY v. THOMAS J. BOLTON.

1. JUSTICE'S COURT — CERTIORARI. — When the justice's court renders judgment against a party, and he carries the case to the circuit court by *certiorari*, it is his duty to appear in that court at the return of the *certiorari*, and point out the errors, if any exist, and if he fail to do so, and the circuit court affirm the judgment, he cannot be allowed here to avail himself of his own negligence in allowing the affirmance by default.

ERROR to the Circuit Court of Hinds County. Hon. GEO. F. BROWN, Judge.

On the 20th day of February, 1872, a writ of garnishment was issued by J. Alexander, justice of the peace, on a certain judgment theretofore obtained in his court, wherein Thos. J. Bolton was plaintiff, and John L. Deterly was defendant. The writ recited that O'Leary was indebted to Deterly, or had effects of Deterly in his possession, and that Bolton had made oath that he did not believe that Deterly had in his possession, visible property, etc. The return on the writ is as follows: Executed this the 21st day of

---

Brief for plaintiff.

---

February, 1872, on the within named P. O'Leary, by reading to him the contents of the writ. On the 6th day of March, 1872, the justice made this entry on his docket. "Judgment rendered on the 6th of March against defendant for \$92."

On this judgment a writ of *fiere facias* was issued and levied on forty cords of wood as the property of O'Leary, one of the plaintiffs in error.

O'Leary petitioned for a writ of *certiorari* on the ground that he was not notified of the place of trial when judgment was rendered, etc. The writ was granted and the case removed to the circuit court. At the June term of the circuit court the following judgment was entered:

"4325. THOS. J. BOLTON v. JNO. L. DETERLY.

Came the plaintiff, by his attorney, and the garnishee came not, but made default; therefore it is ordered and adjudged by the court, that the plaintiff do recover judgment against the garnishee in the above cause, P. O'Leary, and T. J. Stone, the security on his *supersedeas* bond, in the sum of ninety-two dollars and interest thereon, and all costs to be taxed, for which execution may issue." To revise this judgment, O'Leary and Stone sued out a writ of error and brought the case to this court.

The following is assigned for error, to wit: "The circuit erred in granting judgment by default against O'Leary and Stone."

*Smith & Clifton*, for plaintiffs in error:

The circuit court could not enter judgment by default,

1. Because there is no authority for it. The statute is clear and explicit, and reads, "In any cause removed by *certiorari* under this act, the court shall be confined to the examination of the questions of law arising or appearing on the face of the record and proceedings. In case of an affirmance of the judgment of the justice, the same judgment shall be given as on appeals. In case of a reversal, the circuit court shall enter up such judgment as the justice ought to have entered, if the same is apparent; or



---

Brief for plaintiff.

---

may then proceed to try the cause anew on its merits. Code 1871, section 1836.

2. The defendant in the justice's court was the plaintiff in the circuit court, and that court exercised a power which does not belong to any court in the land, to wit: the power to grant judgment by *default* against a plaintiff.

3. The circuit court was restricted to the examination of questions of law arising or appearing on the face of the record, and was compelled to affirm or reverse the judgment of the justice before it could take any further steps, neither of which it did. In case of affirmance, the same judgment should have been given as on appeal. (For which, see section 1834, Code 1871.) In case of reversal, the circuit court should have entered up such judgment as the justice ought to have entered, etc. The justice ought not to have entered judgment by default, because there was no service, or no valid service of process on O'Leary. (See return.)

4. There was no evidence before the circuit court of any indebtedness from O'Leary, the garnishee, to Deterly, the judgment debtor in the justice's court, nor was there any judgment in the papers filed by Bolton in the circuit court, ascertaining and fixing the liability of Deterly to Bolton, but a mere recital of the facts in the writ of garnishment. Nor was there any affidavit as required by the statute. (Sec. 874, Code 1871.) The judgment by default in the circuit court could not be a proper judgment under any view of the case, unless said court treated the case as a suit on the judgment obtained in the justice's court, which it seems would have been absurd. For reasons above given, we think that the court cannot affirm the judgment of the circuit court. It cannot dismiss, because there was no such power in the circuit court, either at common law or by statute, and the proceedings here have been regular, and it cannot pronounce judgment here, because there are issues of fact to be determined. We therefore ask that the cause be reversed and remanded.

No counsel marked for defendant in error.

---

Brief for appellant.

---

PEYTON, C. J., delivered the opinion of the court.

In this case, a judgment was obtained by the defendant in error in a court of a justice of the peace against the plaintiff in error for the sum of ninety-two dollars. This judgment was removed to the circuit court by writ of *certiorari*, when the judgment of the justice of the peace was affirmed. And from the judgment of the circuit court the case comes here upon writ of error.

The only error assigned here is, that the circuit court erred in granting judgment by default against O'Leary and Stone.

P. O'Leary brought the case to the circuit court, and it was his duty to appear in that court at the return of the *certiorari*, and point out the errors, if any existed, and having failed to do so, he cannot be allowed here to avail himself of his own negligence in allowing an affirmance of the judgment of the justice of the peace by the circuit court.

The plaintiff in error will not be permitted to take advantage of his own default.

The judgment must be affirmed.

---

L. B. NEAL v. HUGH ALLISON, Surv'r, etc.

**APPROPRIATION OF CREDITS.**—The law appropriates credits most beneficially for the debtor. The rule is, that where a party is indebted on mortgage and on simple contract, and makes a payment without direction as to its application, the law will apply it to his advantage, i. e. to the mortgage. *McLaughlin v. Green*, 48 Miss., 205; *Poindexter v. LaRoche et ux.*, 7 Smed. & Mar., 718.

APPEAL from the Chancery Court of Madison County. Hon. SAMUEL YOUNG, Chancellor.

The opinion of the court contains a sufficient statement of the case.

*J. A. P. Campbell*, for appellant:

1. Horn being tenant, from year to year, of Neal, and failing

---

Opinion of the court.

---

to pay rent, an attachment lay. Taylor's Landlord & Tenant, p. 423, § 564. Continued occupancy with consent of the landlord, after one year at fixed rent, fixes the rate for the continued lease.

2. Whether an attachment lay in favor of Neal against Horn is not material in this controversy, for, if complainant below had no right to the subject matter of the litigation as against Neal, the propriety of the attachment could be questioned only by Horn, and not by complainant.

Hugh Allison & Co., by virtue of the deed of trust executed by Horn to secure them, had a right to Horn's crop paramount to the claim of Neal, the landlord, for rent; but only to the extent of securing the amount for which the deed was given, as expressed in it. For any advances beyond the sum named in the deed, they were unsecured and general creditors, and Neal's attachment for rent due him, levied on part of the crop raised by his tenant on the leased premises, was paramount to the claim of the unsecured and general creditor by open account.

When the amount secured by the deed of trust was paid, the deed of trust was *ipso facto* discharged between the parties, and *a fortiori* as to third persons.

There was no pretense that any application of payments was directed, at the time of payment, by Horn, or that any application was ever made by the creditor to the unsecured part of the account. The payments were made, and nothing was said on the subject; but the law made the application to the discharge of the deed of trust. *McLaughlin v. Green*, 48 Miss., 175; *Poindexter v. Laroche*, 7 S. & M., 699; *Homer v. Kirkwood*, 25 Miss., 99; *Champenois v. Fort*, 45 ib., 355; 32 ib., 634; 33 ib., 447.

*G. L. Potter*, for appellee.

Reporters find no brief in the record for appellee.

SIMRALL, J., delivered the opinion of the court:

This is a contestation between Neal, the landlord, and Hugh Allison, survivor, over the proceeds of five bales of cotton, which

---

Opinion of the court.

---

had been attached by Neal for rent in arrear from Horn, his tenant.

Allison claims under a mortgage given upon the crop to secure an old balance of \$140 and interest, and the further sum of \$300, to be advanced to make the crop of 1873.

It was shown that Allison has realized \$548.15, proceeds of cotton shipped to him, besides three bales not accounted for and credited. It is agreed, however, that there is a general balance of \$180 due Allison, after crediting these three bales of cotton.

Allison has been overpaid, which was due upon the mortgage. But he sets up a supplemental verbal agreement with Horn, that the mortgage should stand as a security for advances made over and above the sums therein named.

It is admitted by Neal, in his answer, that he had personal knowledge of the mortgage, and that his right to distrain for rent was subordinate to Allison's security. But, when cotton enough had passed to Allison, under that contract, to pay off the debt, the landlord was not put upon inquiry to ascertain what further might be due to Allison, and what, if any, secret agreement might have existed when other advances were made.

No specific directions were given as to the appropriations of the credits at the time the cotton was shipped, or afterwards, by Horn. It was passed by Allison as a general credit on Horn's account.

The law appropriates credits most beneficially for the debtor. *McLaughlin v. Green*, 48 Miss., 205. In *Poindexter v. Laroche*, 7 S. & M., 713, the rule is recognized to be, that if a party is indebted on mortgage and on simple contract, and makes a payment without direction as to its application, the law will apply it to his advantage, i. e., to the mortgage. Apply that principle to this case, and nothing would remain due upon Allison's mortgage.

Certainly, the landlord may attach effects on demised premises for rent in arrear. Allison contests this right, with no better

---

Syllabus.

---

claim than a creditor at large, his security having been satisfied. The landlord ought to prevail.

Decree reversed; and decree rendered in this court to apply the money, raised by the distress for rent on a sale of the property seized under that writ, to the appellant Neal.

---

E. M. HOWD v. MISSISSIPPI CENTRAL R. R. Co.

1. RAILROADS — LIABILITY FOR DAMAGES. — The rule of law, as established in England and most of the American states, is that a servant accepting employment for the performance of specific duties, takes upon himself the natural and ordinary perils incident to the service which are exposures from the negligence of fellow servants in the same common employments. *N. O. J. and G. N. R. R. Co. v. Hughes*, MSS. Opinion Book D, page 226.
2. SAME — LIABILITY TO EMPLOYEES FOR NEGLIGENCE OF FELLOW-SERVANTS. — The master is not liable for injuries which may happen to a servant in his employment, unless the master is culpable, that is chargeable with negligence or carelessness, either in respect to the act that caused the injury, or in the employment of the person who caused it, or keeping him in service after notice of his unfitness, or after, with the use of proper diligence, he ought to have known it. In order to hold the company responsible to an employee (such as a conductor) for injuries sustained because of the road or its appurtenances being out of repair, it must be shown that the company is in default in its duty, either by the selection of incompetent servants or an insufficient number of them to do the work, or failure to furnish proper materials, or that the company had notice of the bad condition of the road, or is chargeable with negligence for not knowing.

ERROR to the Circuit Court of Marshall County. Hon. O. DAVIS, Judge.

The facts in this case are fully stated in the opinion of the court.

*Walter & Scruggs* and *J. Z. George*, for plaintiff in error.

It is conceded on all hands that it is the duty of a railroad com-

---

Brief for plaintiff.

---

pany to *construct* its road so as to be safe. The instructions of the defendant below concede this point.

We insist that the same duty devolves on the company to keep its road in *repair* that controls it in its *construction*. Why not? Precisely the same agencies are employed in both; the same materials are used; compensation for labor comes from the same source, and the same great duty to the public is involved. It is an inherent duty of the company. It is *its* duty; is organic and continuous, and springs out of the very law of its creation.

The act, incorporating the company, declares that it "is hereby vested with all the rights, privileges and powers requisite and necessary for the *construction, repair and maintenance*," etc. The moment the privilege of construction is claimed the company assumes the duty to make construction, repair and maintenance secure. The act of incorporation makes no discrimination between the duty of building and the duty of repairing. Each is an organic, inherent duty, which the company owes to the state and every one of its citizens. *Each is its duty*. There may be some correlative duties due from one class of servants of the company to another class outside of this inherent or organic duty. The organic duty requires the company to have an ordinarily safe track, safe switches and safe locomotives. The correlative duty of one servant to another, is to see that the switch is properly placed, and the locomotive tender properly loaded.

We propose to notice briefly the authorities which sustain us in the position that it is the duty of a company to keep its road in good repair, not only as to the public but also as to its servants. The case of Buzzell v. The Laconia Co., 48 Me., 118, was that of a servant suing a master for an injury caused by the defective *repair* of a bridge.

In Noyes v. Smith, 28 Vt., 59, the doctrine is clearly announced that it is as much the duty of the master to keep his buildings in repair as to construct them.

The same doctrine is held in Massachusetts, in Cayzer v. Tay-

---

Brief for plaintiff.

---

lor, 10 Gray, 274, and in *Coombs v. Cordage Co.*, 102 Mass., 572. In the latter case the court says that "it is perfectly established that an employer is under an implied contract with those whom he employs, to adopt and maintain suitable instruments, means, etc." "The implied contract to have the machinery in such a safe and proper condition as not to expose the servant to unnecessary risk, is the foundation of the master's liability." In *Connecticut*, in *Hayden v. Smithville Co.*, 29 Conn., 548, the court seems to differ from the above views.

The court expresses its regret at the adoption of the foregoing precedent, but felt bound to follow it. We may concede that *Connecticut* is against us.

New York—*Kearnan v. Western*, 4 Seld., 175—ably vindicates the position for which we contend. That case can scarcely be said to be shaken by the case of *Warner v. The Erie R. R. Co.*, 39 N. Y., 471. The reasoning and weight of authorities are certainly with the dissenting opinions in that case, and with the decisions of the same case by the supreme court. 49 Barb., 558. In *Brickner v. N. Y. Cen. R. R.*, 2 Lans., 506, the court attempts to escape the effect of *Warner's* case in 39 N. Y., by holding a company liable for contributory negligence in failing to keep a bridge in repair.

In *Pennsylvania*, in the case of *O'Donald v. Alleghany R. R.*, 59 Penn., 239, the court holds the doctrine that a company is liable for injury sustained by its servant in consequence of defective materials.

In *Maryland*, in case of *Wonder v. Bal. & O. Co.*, 42 Md., 411, the court seems to hold some views adverse to our position. 3 *American R.*, p. 147.

In *Alabama*, in the case of *Williams v. Taylor*, 4 Por., 231, and of *Walker v. Bolling*, 22 Ala. St., 294, the whole doctrine is reviewed and ably decided in support of our views. It may be said, however, that this case is shaken, if not entirely overturned, by the case of *M. & O. R. R. v. Thomas*, 42 Ala., 672. And yet

---

Brief for plaintiff.

---

the court in that case say, p. 714, "there can be no doubt a railroad company is responsible for injuries to their servants, resulting from its negligence." This is the point for which we contend. In Tennessee, in the case of Elliot, 1 Cold., 611, and Haynes, 3 ib., 222, the doctrine for which we contend is boldly and ably vindicated. In Kentucky, in Collins' case 2, Duvall, 114, some original and powerful views in support of our position are held. In fact it goes much further, and holds the doctrine that a company is responsible to a servant for the negligence of a fellow servant.

In Ohio, in the case of Stevens, 20 Ohio, 415; Barber, 5; O. St., 541, and R. R. Co. v. Keary, 3 Ohio St., 201, the doctrine for which we contend is fully maintained.

In Indiana, in Fitzpatrick's case 7, Ind., 436, this doctrine was contended for and fully sustained. We do not deny but that this case has perhaps been shaken by some later decision.

In Missouri, in the case of Gibson (46, No. 163), reported in 2 American R., 497, our position is ably vindicated. The company in that case was held responsible for a defective coupling of its cars. The authorities are also fully noted to the case as reported in 2 American Reports.

In Swett's case, 45 Ill., 197, the court holds that there is an implied contract between the company and its servants, that the former shall provide suitable track, rolling stock, etc, and for failure to perform this duty the company is responsible.

In view of all this uncertainty and confusion, the able commission which framed the Code, 1857, declares, at p. 299, that "every railroad company shall be liable for all damages which may be sustained by any person, in consequence of the neglect or mismanagement of any of their agents, engineers or clerks, or for the mismanagement of their engines."

This provision was wisely carried forward in the New Code, 1871, p. 534, sec. 2429. We have here a clear rule which removes all doubt, uncertainty and difficulty.



---

Brief for plaintiff.

---

The Code intended to establish, and did establish a sound public policy by its enactment, a policy which a majority of the states had already established by judicial decisions. See *Dixon v. Rankin*, 1 Am. Rail. cases, 569. The cases of *Cooper v. Mullins*, 30 Georgia, 146; of *Chamberlain*, 11 Wis., 238; of *Gellentwater*, 5 Port. Ind., 339; of *Stevens*, 20 Ohio, 415; of 3 Ohio St., 201; of *Gibson*, 42 Mo.; of *Collins*, 2 Duvall, 114; of *Greenleaf*, 29 Iowa, 14; of *Elliott*, 1 Cold., 611. See, also, to repudiate the rule in some instances, and in others to warp and torture it.

To remedy all this confusion, uncertainty and doubt, the Code has established a plain and simple rule.

But suppose we are mistaken, we then advert to the position assumed in the commencement of this brief, and again repeat, that it is the *organic* and *inherent* duty of a railroad to keep its track and machinery in repair. It is responsible for rotten ties, broken switches, and defective machinery. It may not be required to *insure* all these, but it is bound to answer for defects which are discernable by men of ordinary observation, or which it might discover by the use of ordinary diligence, *no matter what materials or what kind of agents it employs*.

The master's duty is involved in the first instance and the servant's in the last. In reference to the track and machinery the company is not only bound to furnish the material and the agents, but also to see that the former is properly used by the latter. Should the servants neglect this the company would be bound for *their* neglect of *its* duties.

In the case of *Robinson v. Harbour*, 42 Miss., 795, this court threw a flood of light on the vexed question of dependent and independent covenants. May we not hope in the case at bar some rule may be established that will bring order out of the chaos of the many decisions pronounced upon the point in controversy. We might elaborate the point of the company's liability growing out of the *implied* contract of providing its servants with suitable track machinery, etc., but we simply state the point and again

---

Brief for defendant.

---

call the attention of the court to the case of Coombs v. Cordage Co., 102 Mass., and the other cases before cited on this point.

*W. P. Harris*, for defendant in error:

The facts of this case do not warrant a recovery by the plaintiff below; but as the general question of the liability of the employer to his servants, for injuries occasioned by the negligence of fellow servants, is one of the questions in the case, that question, with elements of which it is composed, will be briefly noted.

The proposition, that as a general rule, no responsibility attaches to the employer for such negligence, where he uses ordinary care in the selection of the servant in default, is established by a weight of authority unprecedented on this class of debateable questions. These authorities are already before the court, and their number is increased by the additions made in the brief of the associate counsel in this case. Indeed, every return of the periodical law publications of the United States swells the list. *Chicago & Alton R. R. Co. v. Murphy*, 53 Ill., 336; 5 Am. Rep., 48. See the instruction in this case, 40 Mich., 105; 4 Am. Rep., 364, Judge Cooly. See large collection of authorities there. *Shearman and Redfield on Negligence*, p. 109; 2 *Hilliard on Torts*, 566.

It cannot be supposed that judicial assent, so weighty and so general, is not founded in the good sense and usage of mankind, and we confidently assert, that in all the industries of the world, the exemption of the employer or master is recognized and acted on.

The common sense of mankind would revolt against a different doctrine. The pungent allusions of the Scotch judge to the law of England, the ingenious argument of the Kentucky judge and the reckless assertions and off hand conclusion of the Tennessee judge to the contrary notwithstanding.

Controversy on the subject is now confined to two points:

1st. What is the care required in the employment of servants, and what is negligence in the retention of them?

The answer is, ordinary care only, and knowledge or circum-

---

Brief for defendant.

---

stances showing that the employer, by the use of that diligence (ordinary) which duty positively required, ought to have known of the incompetency where an incompetent servant is retained unnecessarily, to establish negligence in retaining incompetent servants. *Actual* incompetency is of itself not sufficient to render the employer liable. The actual doctrine — the true principle — is stated in the text of Shearman and Redfield, p. 114–15, §§ 90, 91; 2 Hilliard on Torts, 566–7.

I cite these text writers for convenience. The authorities on which they rest their conclusions are cited by them, and it useless to repeat citations on these points.

2d. Who are fellow servants within the general rule?

This question is settled by many enlightened adjudications. Those engaged under a common master, in the same general business, are fellow servants. Shearman and Redfield on Negligence, 124.

Let us look into the reasons and principles which enter into this question.

In the first place, the fundamental reason of the employer's exemption from responsibility to servants engaged in his employment, is that the servant impliedly engages to take the risks incident to his employment or service. These are the known and usual risks, and amongst these is the risk from the negligence of those engaged in the same business. The master is not the insurer of the infallibility of those he employs, and on the other hand, the servant, especially if engaged in a hazardous work where negligence is necessarily attended with danger, is supposed to contemplate his risk, and, therefore, to be on the watch to avoid danger, and consequently is expected to report acts of neglect and cases of incompetency.

Giving this scope to the foundation of the rule, and it is not so broad as many authorities warrant, and we find that it necessarily and rationally embraces those engaged in a common business under a common master, and then actual employment and connec-

---

Opinion of the court.

---

tion such that one is endangered by the negligence of the other, where the conduct of each is under the daily observation of the other.

Certainly the conductors and engineers of trains are in such connection with switch tenders and flagmen, and the permanent employees to repair the railroad and to remove obstructions.

If we drop the test that one is not the fellow servant of another, unless one controls the other, or that the company is always liable to those servants who are injured by others *whom they do not control*, we at once overthrow the whole doctrine, because if I have the control of the conduct of others, I am responsible for their mismanagement (and there can be no other reason for this strange doctrine), and the neglect by which I am injured is my own. The result would be that the company would be liable in every case unless the servant contributed directly or indirectly to the accident.

This case is settled by decision in case of N. O., N. J. & G. N. R. R. Co. v. Hughes.

SIMBALL, J., delivered the opinion of the court.

This suit was brought by E. M. Howd, widow, against the Mississippi Central R. R. Co., to recover damages for the loss of the life of her husband from injuries received by the running off, and breaking of a portion of the cars of the company; William W. Howd, the husband, was a conductor, in the employment of the defendant, and was acting in that capacity on the train at the time the casualty occurred, causing his death.

The first count alleges that the company did not use due and proper care to have and keep its railroad in good repair and condition, but suffered and permitted its railroad in its road bed, cross ties, iron and the strength and condition of its track, to be in bad repair and condition, and knew such defect or could have known the same by the exercise of reasonable diligence, but the same was unknown to William W. Howd; and that the casualty which be-

---

Opinion of the court.

---

fel the train of which he was conductor, and which caused his death, was attributable to the bad repair and condition of the railroad.

The second count alleged that it was the duty of the defendant to keep its rolling stock, engines, tender and cars in good order and repair. That the casualty was caused by the bad repair and condition of the engine tender, rolling stock, comprising the train, which was known to the defendant, or would have been known by the use of reasonable diligence.

No evidence was offered by the plaintiffs under the second count; and that may be dismissed without farther consideration. The effort was, under the general issue, to sustain the cause of action stated in the first count.

That count assumed, or affirmed by implication, that if the railroad was not in proper repair and condition to afford reasonable safety to a passenger train traversing it, and the casualty occurred by reason of the road being out of repair and in bad condition, which was known to the defendant, or might have been known by the use of reasonable diligence, but was unknown to Howd, the conductor, then the plaintiff can recover.

It is the duty of the master or employer to furnish his servant or employee with the materials, tools and appliances suitable for the performance of the service required of him. If the service is hazardous, and involves the use of implements and instrumentalities, in themselves dangerous, it is presumed that the servant accepts the service with the usual hazards incident to it; and that he has stipulated for wages, proportioned to the risk. But the master must use reasonable care, such as men of ordinary prudence employ; to provide safe implements and instrumentalities, suitable for the business.

The conductor of a train on a railroad assumes all the risks incident to the employment. But the company is under a duty, to exert reasonable care for the safety of its servants, by providing a safe railroad bed, bridges, rolling stock and machinery, and to

---

Opinion of the court.

---

keep the same in proper repair and order. In view of the magnitude of the undertaking, to properly equip, keep in repair and operate a railroad of the length and business of the defendants, extending from Canton, in this state, to Jackson, Tenn., and looking beyond that to the vast system of railroads with which this, and others in this state are connected; so blended all over the country as to constitute the chief means of internal travel and commercial transportation — the questions affecting the relations of these corporations, with those in their service, and with the public, partake very much in importance, as we observed on a former occasion, of the nature of public questions. And the rules which may be established by the courts, very largely affect the interests of the community.

Testimony was offered by both parties on the trial as to the condition of the road at and near the place of the catastrophe. The witnesses of the defendant represented the road as safe. The testimony for the plaintiff tended to show that it was dangerous because of decayed cross ties and loose spikes. It cannot be determined with entire satisfaction what was the proximate cause of the accident. There was evidence that one of the rails was entirely off the track, and the jury might have inferred that it had been removed before the train reached the spot, and that its displacement caused the tender and passenger coaches to be thrown off.

Upon all the controverted points upon which testimony was produced, the verdict can well be sustained unless the jury were misdirected by the court. The entire body of the case is embraced in the instructions.

The first charge for the plaintiff was, that if the train was thrown from the track by reason of a defective road, and that fact was known to the defendant, or would have been known by the use of reasonable diligence, then the plaintiff could recover, if the defect was unknown to the conductor Howd, or could not be discovered in the nature of his employment.

---

Opinion of the court.

---

The second instruction declares that it is the duty of the defendant to use reasonable precaution for the safety of its employees, and to furnish a suitable railway and keep it in such reasonable good condition as not to endanger their safety.

The third charge makes the defendant liable if, with its knowledge or by the use of reasonable diligence, it would have known the road was in an unsafe condition for running trains, and Howd, the conductor, had not such knowledge or the means of knowing from the nature of his employment.

The fourth and fifth charges, in other forms of expression, embody the same ideas of the law.

The sixth charge declares that whilst the defendant would not be liable if it used reasonable and proper care in procuring suitable agents to keep up its track in order, and furnished suitable material to keep the same in repair, yet, if the defendant was negligent in the selection of agents to keep the track in repair, and knew of the defects of such agents, or could have known it by the use of ordinary diligence, and that the accident which caused the death of Howd was referable to an imperfect track, which was not known by him, or discoverable by the nature of his employment, and that defendant did know it, or might, with the use of ordinary diligence, have known it, then plaintiff ought to recover.

For the defendant the court charged that the burden of proof is upon the plaintiff; as to the bad condition of the road, or in not using proper care in the selection of agents, or in continuing them in service after notice of incompetency or negligence; and if the loss of the life of Howd, the plaintiff's husband, was caused by the negligence of the fellow-servants, the defendant is not liable, and that all persons employed by the same master in the same general business are fellow servants.

Since the case was tried in the circuit court, we have decided the case of *N. O., J. & G. N. R. R. Co. v. Hughes*, which disposes of many of the points argued by counsel.

---

Opinion of the court.

---

The question most discussed by counsel is, whether the master is liable where the injury to the employee is the result of the negligence and carelessness of fellow servants.

In *N. O., J. & G. N. R. R. Co. v. Hughes*, decided at the last term, we accepted as the rule upon that subject, established by unbroken authority in England, and the concurrence of most of the American states, that in such circumstances, the master was not liable, unless he was chargeable in the first instance with the want of reasonable, ordinary care in the selection of his servants, or continued them in service after notice of their negligence or carelessness, or, it may be added, after he ought to have known of their unfitness, and could have known by the use of due and reasonable diligence, or after actual notice. A railroad corporation must be responsible like a natural person, for all the consequences which befall an employee, that may be referred to its own negligence or carelessness. We can only find the ideal personage in its organs and higher agencies for conducting its business. The stockholders and owners of the franchises and property, act through agencies, and only through them.

The duty is devolved upon the corporation to maintain a railroad, rolling stock and motive power, with the usual and necessary appliances and accommodations, safe and suitable to the character of its business.

It must keep the road bed, cars, machinery, etc., in reasonably safe repair. The implied undertaking with its conductors, engineers, brakemen, etc., and other grades of employees, is that it will use that measure of care, and caution which ordinarily prudent men would exert, in performing this duty. But in the nature of things how shall its duty be met, as respects keeping the road in proper repair, its locomotives, cars, and other machinery. The board of directory, or managers, must meet together, consult and devise measures for the orderly management and conduct of the general business, and must intrust the various departments to suitable agents. The details as respects the maintenance of the



---

Opinion of the court.

---

track was shown in evidence in this case. Sections of the road are committed to a section master, with a corps of workmen. The corporation will have done all that could be reasonably required of it, when it exercised circumspection and prudence, in appointing employees, to observe the road, make the repairs, and when it put at their disposal suitable material for the work; and when it caused suitable supervision to be had over these local employees. For if a part of the road should become unsafe because of the neglect of such employees to make repairs, and should so continue for a length of time, sufficient to induce the presumption that the company knew of it, or ought to have known of it; then it is negligent and careless, and is liable to other employees, for injuries resulting therefrom. It was satisfactorily proved that the section master had workmen enough, and material enough to keep the part of the road assigned to him in repair. It was also his duty to report the condition of the road to the deputy superintendent, who for the purpose securing such notice represented the corporation. It was also the duty of the conductors to give him information of any part of the road being out of repair. Perhaps the preponderance of the testimony was that the road was reasonably safe. No report had been made to the proper officer, by any conductor, or other person that it was out of repair, or that the section master was derelict in duty.

It was distinctly stated in *Wright v. N. Y. C. R. R. Co.*, 25 N. Y., 562, "that the railroad company knew or ought to have known of the defect which caused the injury." Negligence being the gist of the action, that must be brought home to the company, either by proof of their knowledge of the defect, or that they were negligent and careless in the selection of agents; or that after notice of incompetency, they remained in service. *Hard v. Vermont C. R. R. Co.*, 32 Vt., 473 is emphatic on the same point. Also *Warner v. Erie R. R. Co.*, 39 N. Y., 478. The argument on this point is summed up with great precision and terseness by Lord Cairns in *Wilson v. Morry*, in the House of Lords, Appel-

---

Opinion of the court.

---

late Series, part 3 — "The master has not contracted to execute in person the work connected with his business, but to select competent persons to do so, and furnish them with adequate materials and resources for the work. If the persons so selected are guilty of negligence that is not the negligence of the master." The principle had an application in *C. & A. R. R. Co. v. Murphy*, 53 Ill., 336, which was an action by the administratrix of the deceased, who was a workman with several others, under one Hill, as foreman, whose duty was to examine all the trains that arrived at Bloomington, and make needed repairs. Deceased and fellow laborer had been at work about a freight train, and had started with their tools to the shop, where they were to be deposited; whilst walking between the rails of the main track, deceased was struck by a switch engine. This engine was under the immediate control of the yard master, and was used for various purposes on the yard grounds. It was conceded that the engineer upon the switch engine was careless (and waiving the question of want of care, on the part of the deceased), it was held that the deceased and engineer were fellow servants; and under the rule, accepted in that state, the corporation was not liable. In the case of *Noyes v. Smith & Lee*, 28 Vt., 61, the injury was occasioned by the explosion of an engine. It was held to be the duty of the master, to use reasonable care in procuring the engine, and if he knew that it was defective, he was liable. In *Keegun v. W. R. R. Co.*, 8 N. Y., 180, the boiler was defective and dangerous, and had been several times so reported to the defendant, which was entered on the defendant's books kept for that purpose. The defendant was responsible for using the engine, known to be defective. The following cases are referred to as explicitly stating the circumstances, under which the master is or is not liable. *Williams v. Clough*, 3 Hurl. and Nor., 259; *Patterson v. Wallace*, 1 McQueen, 748; *Marshall v. Stewart*, 33 Eng. L. & Eq., 1; *Tarrant v. Webb*, 866; *C. L.*, 796; *O'Donnell v. A. V. R. R. Co.*, 59 Penn., 246.

---

Opinion of the court.

---

In *Chicago & N. W. R. R. Co. v. Swett*, Adm'r, 45 Ill., 201, the injury resulted in the death of the fireman, on the locomotive engine, from an original defective construction of the road, its bridges, culverts and appurtenances, the company was held liable on the principle that the corporation was bound to furnish to their servants safe materials and structures. See also *Davis v. Milwaukee R. R. Co.*, 20 Mich., 105. The principle established by the authorities may be stated in this formula. The master is not liable for injuries which may have happened to a servant in his employment unless the master is culpable, that is, chargeable with negligence or carelessness either in respect of the act which caused the injury, or in the employment of the person who caused it, or keeping him in service after notice of his unfitness, or after, with the use of proper diligence he ought to have known it.

A railroad company is bound in the original construction of its road and appurtenances, to make it reasonably secure for the safe transportation of trains upon it, and also to keep the track in repair.

In order to discharge the latter duty the corporation must employ suitable persons and supply them with needful material to make repairs; and should also through its agent or agents, have a supervision over the road. In order to hold the company responsible to an employee (as a conductor on its train) for injuries sustained, because of the road or its appurtenances being out of repair, it must be shown that the company is in default in its duty, either by the selection of incompetent servants or an insufficient number to do the work, or failure to furnish proper material, or that the company had notice of the bad condition of the road, or is chargeable with negligence for not knowing.

The instructions to the jury, taken as a whole, are in accordance with the views herein expressed and those enunciated in *N. O., J. & G. N. R. R. Co. v. Hughes* (MSS.)\*

\*Those given at the request of the plaintiff embody correct rules of law with great clearness and precision.

---

Opinion of the court.

---

We have given mature reflection to the principles adopted in the case last cited and reiterated in this opinion, and adhere to them as reposing upon sound reason and considerations of policy. All the great businesses of the world are carried on by means of agencies. Accidents are incident to all employments, requiring caution, skill and diligence. The employer has exhausted his resources for the safety of himself, his family and property, when he has been careful to select competent servants. He can do no more for the safety of his servants than to exercise reasonable circumspection in choosing those who are associated in a common business, and to supply them with proper and suitable materials, appliances and instrumentalities according to the nature of the service. When these duties have been performed, negligencies on the part of any of them are risks incident to the service, which each employee takes upon himself.

Every member of the community has an interest that the great and necessary business of the transportation of passengers and freight by the railroad companies, shall be promptly and safely done. It seems to us that the tendency of the rule of the non-liability of the corporation to an employee for the negligence of a fellow servant, subject to the limitations we have stated, is to stimulate the zeal and vigilance of employees to be careful and watchful to guard against accidents. At the same time we would hold these corporations to a faithful fulfillment of all the correlative duties incumbent upon them for the safety of those in their service.

It need hardly be remarked that very different responsibilities attach to railroad companies, and other public carriers, for injuries sustained by passengers and shippers of goods, or strangers for injuries sustained either in person or property, from the negligence of servants and employees.

The judgment of the circuit court is affirmed.

## Brief for plaintiff.

## E. H. HARGROVE v. MARY E. BASKIN, Adm'r.

1. **CHANCERY PRACTICE—WHEN REAL ESTATE OF DECEDENT LIABLE TO BE SOLD.**—When an administrator or executor ascertains the personal estate of a decedent to be insufficient, then he shall petition the court for a sale of the land. The heir or devisee must be made a party, and may contest the relief sought, by showing that there are no valid subsisting debts, or that there were once sufficient personal assets, which have been wasted by the executor or administrator, and legal remedies have been exhausted on his bond. *Paine v. Pendleton*, 32 Miss. R., 323.
2. **SAME—POWER OF ADMINISTRATOR OVER IT.**—Immediately upon the death of the ancestor the real estate descends to the heir, and as against him the liability of the land to be sold for the decedent's debts must be established in the mode pointed out by the statute. The administrator cannot interfere, nor has he any interest in or power over the land.
3. **SAME—POWER OF CHANCERY COURT.**—The chancery court has not the power under its equity jurisdiction, to reach the real estate of a debtor, except upon the predicate that the creditor had an equity in the form of a charge or incumbrance. If the charge or equity is created by statute, with a mode of procedure clearly defined, that remedy must be pursued. The creditor by judgment against the personal representative, acquires a lien on the assets in his hands. As against the real estate, the judgment confers no greater privilege than the note or bond upon which it was founded.
4. **POWER OF JUDGMENT CREDITOR AGAINST A DECEDENT'S ESTATE.**—A creditor having judgment against a decedent's estate, has not advanced a right to subject the land. Nor is he aided by the fact that the final process against the personal assets has been fruitless. That is a creditor's bill, proposing to withdraw the administration of the real assets from the statutory jurisdiction of the chancery court, to be dealt with under its general equity powers, which the law does not permit.

ERROR to the Chancery Court of Chickasaw County. Hon. AUSTIN POLLARD, Chancellor.

The opinion of the court contains a sufficient statement of the case.

*Tucker, Hurper & Buchanan*, for plaintiff in error:

Contended that section 1148 of the Rev. Code of 1871 is merely cumulative, and does not interfere with other modes of proceeding

---

Opinion of the court.

---

against the estates of decedents. Independent of this statute, a creditor in behalf of himself and other creditors can file his bill to have the lands sold for the payment of debts. If there has been no administration and no personal property it is unnecessary to make the administrator a party. Code, § 977.

Chancery courts have jurisdiction in all matters of equity, and if the administrator refuses or neglects to sell the real estate for the payment of debts, or if from any cause there is no administration and the creditor cannot compel the administrator to do his duty, he has the right to set forth his claim in a court of equity, and that there is real estate in the hands of heirs belonging to the estate, subject to the satisfaction of debts; and it is a matter of equity that the land should be sold for the payment of his claim.

*Davis & McFarland*, for defendant in error:

At common law, as a general rule, upon the death of the ancestor, the lands descended to the heir, freed from his debts, excepting debts by specialty, or those in favor of which he had bound the land, or in which it was bound by operation of law. 2 Jarm. Wills, 364 *et seq.* This rule was changed by statute to the extent that both real and personal property of the decedent were subject to the payment of debts. But this change did not affect the necessity of applying and exhausting the personal property as the primary fund for the payment of debts. That the personal property must be exhausted before the real estate can be resorted to is still recognized by statute and in practice. *Evans v. Fisher*, 40 Miss. 643: Rev. Code of 1871, §§ 1148-1152, 1158-1162.

SIMRALL, J., delivered the opinion of the court:

In October, 1869, E. H. Hargrove recovered a judgment against Mary E. Baskin, administratrix of I. H. Baskin, deceased, for \$1,026.20, upon which execution was issued and returned "*nulla bona*." The original and amended bills against the administratrix and heirs of I. H. Baskin, deceased, allege that there is no personal property out of which the judgment can be satisfied; there-

---

Opinion of the court.

---

fore the complainant claims and prays that the real estate of which the intestate Baskin died seized, shall be sold, and the money applied to pay heirs, and all other creditors who will come in under the decree. Upon demurrer, the bills were dismissed.

The question is, whether a creditor, who has recovered judgment against the administratrix, and has exhausted the legal means to procure satisfaction out of the personal estate, can proceed directly by bill in chancery, against the personal representative and heirs, to sell the lands and tenements to pay his own debt, or can such suit be sustained on behalf of himself, and others who may prove their debts, and contribute to the expenses of the suit.

Our statutes have made important changes in the common law, as to the liability of real estate for the debts of a testator, or intestate. Personal assets rested in the personal representative, and were the only fund liable to creditors, except the decedent had bound his heir by specialty. Such was the common law of England, until the statute of William and Mary, 3d and 4th chaps, 14. 47 George III, 1 George IV, and 1 William IV, subjected lands and tenements to the payment of debts generally, preserving, however, the right of priority to the specialty creditors.

The provision of statute law with us is, "the lands, tenements and hereditaments of the testator or intestate, shall also stand chargeable for the debts, over and above what the personal estate may be sufficient to pay." "And may be subjected to the payment of debts in the manner hereinafter directed." Code 1971, § 1134. Full directions\*for such proceedings are given in sections 1148, 1449. \* \* When the contingency shall have arisen, that is, the personal estate shall have been ascertained by the executor or administrator to be "insufficient," then he shall present a petition to the court for a sale of the land. The heir or devisee must be made a party, and may contest the relief sought, by showing that there are no valid subsisting debts, or that there were once sufficient personal assets which have been wasted by the executor

---

Opinion of the court.

---

or administrator ; and legal remedies have been exhausted on his bond. *Paine v. Pendleton*, 32 Miss. Rep., 323 ; *Ferguson v. Scott*, (MSS.) at this term. The statute makes the "lands, tenements \* \* chargeable with the debts, over and above what the personal estate may be sufficient to pay. Subject to that burden, they descend immediately upon the death of the ancestor to the heir. *Campbell v. Brown*, 6 How., 234 ; *Bullock v. Sneed*, 13 S. & M., 393 ; *Root v. McFerrin*, 37 Miss., 46 ; *Ferguson v. Scott*, MSS. All the cases concur that the heir succeeds immediately to the estate by descent cast ; and as against him the liability of land to be sold for the decedent's debts, must be established in the mode pointed out by the statute. The administrator can not interfere, "nor has he interest in, or power over the land, except in the contingency mentioned. It is appointed his duty to make effectual the charge imposed upon it." That is accomplished by appealing to the statutory power, once conferred upon the probate court, but now vested in the chancery court, for a license to sell. *Root v. McFerrin* (supra) ; *Hollman v. Bennett*, 44 Miss. Rep., 326-7-8-9.

The theory of our statute is, that the real estate of a decedent shall be chargeable with the debts, in a certain manner. The act which imposes the burden, at the same time defines the mode by which it shall be realized. There never was power in the chancery court, under its equity powers, to reach the real estate of a debtor, except upon the predicate that the creditor had an equity in the form of a charge or incumbrance. If the "charge" in equity is created by statute with a mode of procedure clearly defined, that remedy must be pursued. The creditor, by judgment against the personal representative, acquires a lien on the assets in his hands, which may be satisfied by final process. As against the real estate, the judgment is no more efficient, conferring no greater privileges, than did the promissory note or bond upon which it may have been founded. Such judgment creditor has not advanced a right to subject the lands better than he had before he sued at law. Nor is he aided by the fact that the final process



---

Opinion of the court.

---

against the personal assets has been fruitless, and he prefers to divide what may be realized by a sale, equally with other creditors. That is a creditor's bill, proposing to withdraw the administration of the real assets from the statutory jurisdiction of the chancery court, to be dealt with under its general equity powers. The books contain no case where such a bill has been sustained. The chancery jurisdiction over matters testamentary and of administration, conferred by the present constitution, is in the same words as employed in the constitution of 1833, in reference to the probate court. When we look at the mode in which the latter court exercised jurisdiction over these subjects, it will be seen that it is almost exclusively statutory. The same statutes, with slight changes, have been made applicable to the chancery court, so that the same line of argument, which could be made now to show that such a bill could be sustained, could have been made with equal cogency under the former system. That such suits never have been brought is persuasive that it was the received opinion of the profession that the method of proceeding, as defined in the statutes, is the exclusive remedy. It is plain, simple and speedy.

When the legislature declares that lands and tenements shall be liable for debts, and lays down the mode of reaching and so applying them, such statutes being in derogation of the common law, should be strictly construed.

The arguments that stand in the way of the complainant are : That it is by virtue of the statute that real estate has been made assets for general creditors, and a specific mode defined by which the title of the heir may be withdrawn, and the land converted into money, and apportionment and distribution made among creditors. Such legislation being an abridgment of the rights of the heir as at common law, should be strictly construed.

The complainant has no specific equity upon the real estate which affects it, more than any simple contract creditor ; and there is no jurisdiction in a court of equity by virtue of its ordinary

---

Syllabus.

---

powers, to decree a sale of land at the suit of a creditor, unless he shows a specific equity.

The right of the chancery court to entertain a suit to sell lands to pay the creditors of a decedent is purely statutory, and must be invoked by the personal representative, who in the estimation of the law is the trustee of the creditors, and under an official duty to interpose in their behalf whenever the contingency arises. For any failure or omission of duty in this behalf, he is amenable upon the suggestion of a creditor to the chancery court.

There is no other mode for a creditor, without judgment lien or a specific equity or incumbrance, to reach the real estate of a decedent, except in the statutory mode appointed for dealing with them as assets.

The decree is therefore affirmed.

---

M. PATRICK, Guardian, etc. v. WILLIAM CARR et al.

1. PRACTICE—PLEA OF NON EST FACTUM.—Under the plea of *non est factum*, the issue is the genuineness of the signature of the defendant, and it is error to instruct the jury that it is incumbent upon the plaintiff to prove the plea and affidavit false. It was only incumbent on the plaintiff to prove the signature of F. Carr to the note to be genuine.
2. VERDICT—"PUT IN FORM."—Where the verdict of the jury is "put in form" in the presence of the jury, as to the calculation of interest only, and no complaint is made of errors in the calculation, or in the amount of the judgment, *held*, that this is not error, though this court is unwilling create precedents of this character. It was an informality, but perhaps not an irregularity, but tends to irregularities and errors, if not to abuses.

ERROR to the Circuit Court of Smith County. Hon. J. W. WATTS, Judge.

The facts of the case are fully stated in the opinion of the court.

---

Briefs.

---

*W. B. Shelby*, for plaintiff in error, cited 1 Greenleaf on Evidence (12th edition Redfield), §§ 577 to 581, pp. 622-625; 1 Greenleaf Ev., § 52; *ib.*, § 440, note 3 on page 483; *Walker v. Com'r Sinking Fund*, 1 S. & M., 372.

*A. B. Smith*, on the same side, cited *Norfleet v. Ligman*, 41 Miss., 631; *Burns v. Kelly*, *ib.*, 339; *Baker v. Justice*, *ib.*, 241; *Lombard v. Martin*, 147 *ib.*, 39; *Herndon v. Bryant*, *ib.*, 336; *Fairly v. Fairly*, 38 *ib.*, 280; *Wright v. Clark*, 34 *ib.*, 116; *Dougherty v. Vanderpool*, 35 *ib.*, 165; *Garnett v. Kirkman*, 33 *ib.*, 389; *Heirn v. McCaughan*, 32 *ib.*, 18; *Greenwood v. Mills*, 31 *ib.*, 464.

*Mayers & Lowery*, for defendants in error:

As to the first assignment of errors by plaintiff in error, it will be seen that, if the ruling of the court was error, the plaintiff was not prejudiced by it, because Crook was, in a subsequent part of his testimony, permitted to give his *belief* as to the signature, and plaintiff had full benefit of that belief before the jury. In regard to the proof, by witnesses, of the habits of Carr about suretyship, telling his family his business transactions, etc., it was at best, circumstantial testimony, but was competent under the issue. Carr was entitled, as well as plaintiff, to the benefit of every fact and circumstance tending to show the truth of his side of the issue.

Plaintiff objects to the giving of 2d, 3d, 4th and 7th instructions for defendant Carr. In the 2d, the court said, if the plaintiff had it in his power to adduce a living witness to explain the signing of the note, and failed to do so, it was a fact the jury might take into consideration. In this there was no error. See 39 Miss., 157. The 3d instruction propounds the law in this, as well as other states, and commends itself to the favor of every judicial tribunal. But more than that, *none of the witnesses for plaintiff are experts*, and they so stated.

To the 4th, we can see no objection. It was not possible for Carr to bring proof that he did not sign it, beyond his own oath. He might have brought scores of witnesses, who could have said

---

Opinion of the court.

---

they did not believe he signed it. The fact that he did not, but relied upon his own testimony, can have no weight against him, and the court so ruled. We can see no objection to the 7th. It was not the province of Carr to hunt up the man who forged his name to the note; but it was incumbent on the plaintiff to show that Carr signed the note. Carr's theory was, his name was forged, and the instructions propounded the law correctly. The plaintiff had the full benefit of all the instructions he asked, without objection.

The issue was not on the first plea and notice, but on the second plea and affidavit. The clerk, however, copied both. The objection to the verdict, we presume, is not insisted on.

The jury found *for* F. Carr and *against* Wm. Carr, for the amount of note and interest, and the clerk, under directions of the court, made the calculation and entered up the judgment accordingly against Wm. Carr.

Patrick ought not to complain, as it was in his favor, if any error was committed.

A new trial was correctly refused. The verdict was not only *not* "manifestly wrong," but right and proper. The jury chose to believe a truthful and honest man, whom the witnesses "had known for thirty or forty years," in preference to the opinions of men, not experts.

The facts and circumstances connected with the case, as detailed by the witnesses, taken all together, fully justified the verdict.

There was no error in the ruling of the court that did, or could prejudice the plaintiff.

The judgment should be affirmed.

TARBELL, J., delivered the opinion of the court:

This action was brought in the circuit court of Smith county at the September term, 1866, upon a promissory note of which the following is a copy, viz:

"\$1,121.55. On demand, I promise to pay Mr. Patrick or bearer,

---

Opinion of the court.

---

guardian of the minor heirs of Isaac Carr, deceased, the sum of eleven hundred and twenty-one dollars and fifty-five cents, with ten per cent. interest from date, this April 6th, A. D. 1860.

[SIGNED]

WM. CARR,  
F. CARR."

At the March term, 1868, of that court, a judgment was obtained upon the note against William Carr, with a verdict for the defendant, F. Carr, who pleaded *non est factum*. There were eleven witnesses sworn for the plaintiff, eight of whom testified that they were acquainted with the handwriting of the defendant, F. Carr, having seen him write, and having a general, some of them, a particular knowledge of his handwriting. Two of these were lawyers — both of whom knew his handwriting — and one had transacted business for him in his professional character. One had been a merchant of Smith county for thirty years. One had been clerk of the county many years. Two were near relatives. All pronounced their positive opinion that the signature to the note was genuine. Two of the eleven had held a conversation with the defendant, F. Carr, about this note, and testified, that he said the signature thereto was very like his, but if he signed it, he had forgotten it. The eleventh was the plaintiff, who testified that on one occasion he said to F. Carr that he should require his signature to two certain notes, this one sued on and another, to be executed by his nephew for moneys due the estate of Isaac Carr deceased, brother of defendant, of which the witness was administrator — to which defendant replied that he reckoned the boys were good — afterwards the notes of which that sued on is one were brought to him signed.

It appeared that defendant, F. Carr, had on some occasions become surety for others, though he was a prudent, cautious man about becoming security.

Three witnesses for defendant testified, that it was the habit of defendant to make known his business to his family, and this note had never been mentioned until after suit brought; and that he

---

Opinion of the court.

---

was a very cautious and prudent man in his business; as did one or two of the witnesses for plaintiff. The witnesses for defendant were not asked their opinion of the signature to this note, and expressed none. In response to questions by defendant's counsel, nearly all the witnesses testified that defendant was an honest, truthful man.

Defendant, F. Carr, himself testified, that he never signed this note; that he was seventy-three years old, and a member of the Methodist church; that he had no secrets from his family, and seldom gave a note for any purpose, as he generally paid down; that he was not asked to sign this note by any one; that he did not owe the parties anything, and was under no obligations to sign this note, and did not sign it. The credibility of no one of the witnesses on either side was attacked.

The following are such of the instructions given for defendant, as are objected to by plaintiff:

(2.) That if the jury believe from the evidence that the plaintiff had it in his power to adduce living witnesses to explain the signing of the note by F. Carr, and he failed to do so, it is a fact which the jury may take into consideration in making up their verdict.

(3.) That the opinion of experts is intrinsically weak, and ought to be received and weighed by the jury with great caution.

(4.) That because F. Carr did not introduce witnesses to prove that they did not believe it was F. Carr's signature, is no evidence that Carr did not sign the note.

(7.) That it was not incumbent on F. Carr to show who forged his name; on his plea and affidavit, it was incumbent on the plaintiff to prove his plea and affidavit are false.

The verdict of the jury was in these words: "We, the jury, find for the defendant, F. Carr, and against Wm. Carr, the amount of the note and interest." The record then recites that on motion of defendant, the court directed the clerk to calculate the interest and enter the verdict in form, to which defendant objected and excepted.

---

Opinion of the court.

---

The plaintiff moved for a new trial, on the following grounds :

1. Because the verdict of the jury was contrary to the law and evidence.

2. Because the court erred in permitting the clerk to calculate the interest due on the note sued on; the jury in their verdict having failed to make such calculation and because the verdict of the jury was wholly irregular and informal in this, that it did not specify the amount found by them against William Carr, one of said defendants.

3. Because the court erred in granting the instructions asked for by defendant.

The causes assigned for error are the following :

1. The court erred in sustaining the objection of defendant's counsel to the question asked witness, Lewis E. Cook, on page 17 of the record, "If from the knowledge thus derived of defendant's signature, he believed the signature to the note sued on to be genuine?"

2. The court also erred in overruling the objection of plaintiff's counsel to the testimony of Lewis E. Crook, J. W. Ward, R. W. Huey, and Emanuel Carr, as to the business habits of F. Carr, his caution in giving security, his communicating all his business to his family, and that none of said witnesses had ever heard of the fact that he was security on the note until after suit brought.

3. The court erred in granting the second, third, fourth and seventh instructions asked for by defendant and objected to by plaintiff.

4. The court erred in permitting the verdict of the jury to be amended by the clerk.

5. The court erred in overruling plaintiff's motion for a new trial.

1. As to the first cause assigned for error, the question is objectionable in form as it indicates to the witness the answer sought. It is what is commonly denominated "leading," and under the circumstances the court was right in sustaining the objection of counsel. 1 Greenleaf on Ev., 437, 434, a.

---

Opinion of the court.

---

When the court has a discretion in permitting or refusing "leading questions," see *ib.*

2. *As to the second cause of error.* Evidence, that a man has been many years a resident of a county — that he has borne an irreproachable character — that he is advanced in years, and is a member of the church in support of a party in anticipation and in advance of his own statements as a witness, and before his character is attacked, is, perhaps, a somewhat novel mode of investigating or trying a case; nevertheless, such testimony may doubtless be made admissible by other evidence, or when the character of the party is involved, as it may sometimes be in *assumpsit*. It is difficult to state any definite rule upon this point, so much depends upon the attitude of the case. Whether upon the facts and circumstances set forth in the record, the court was right or wrong, in this instance, we need not determine, as the cause must be sent back upon other grounds, and the case may be very differently presented on another trial.

The third allegation of error embraces objections to the 2d, 3d, 4th and 7th instructions for defendant. The second instruction for defendant is a correct legal proposition. If there was a living witness who could explain the signature, prudence would dictate to counsel to produce his testimony or explain his absence. The fact or circumstance might have left the weight with the jury, yet it is one they would be entitled to consider. The record, however, does not show that there was any such person in existence, and, therefore, the instruction is erroneous.

Nevertheless, we cannot consider the instruction as seriously objectionable.

The third instruction for defendant was improper. The proof of the handwriting was not by means of *experts* (1 Gr., 440-440 a), but in the ordinary mode by witnesses who testified from their personal acquaintance with the handwriting in question. 1 Gr., 576-577.

The objection to this instruction is not merely that, while it is



---

Opinion of the court.

---

a correct proposition of law, it is yet inapplicable to the case. It is more. In view of the facts before the jury, it was equivalent to telling them, that the testimony, as to the genuineness of the signature, was entitled to very little consideration. It was, in effect, a direct and pointed instruction upon the weight of evidence, and, therefore, seriously erroneous.

The fourth instruction, as given in the record is an absurdity. We presume the word "not" between the words "Carr did" and "sign the note" was *not* in the original. Without that word, the instruction, qualified by permitting it to go to the jury as a circumstance for their consideration, would have rendered it unobjectionable, or, at least impartial. 39 Miss., 157.

The seventh instruction assumes as a fact the forgery of the signature of F. Carr — the genuineness of that signature being the very point in issue to be determined by the jury. This was a serious error, made more pointedly objectionable by the concluding clause of the instruction, that it was incumbent upon the plaintiff to prove the plea and affidavit false. It was only incumbent upon the plaintiff to prove the signature of F. Carr to the note to be genuine.

The action of the court upon the verdict was an informality, perhaps, but hardly an irregularity. This court does not look with favor upon so loose a practice. It is a careless administration of justice, causes complaints, tends to irregularities and errors, if not to abuses.

This case comes within the spirit of the statute of amendments and *jeofails*. It is unlike the case in 1 S. & M., 372, wherein, in an action of detainue, for several articles, the verdict being in gross, the court, after the jury had been discharged from the consideration of the case and retired, assumed to assess the value of each article, without any clue to the opinion of the jury as to their separate value, which was held to be error.

In 24 Miss., 188, the clerk had accidentally omitted the word "dollars" in the entry of judgment. On a motion to set aside

---

Opinion of the court.

---

execution issued on this judgment, the court sustained the judgment and overruled the motion.

In 1 How., 579, the jury found for the plaintiff "the debt in the declaration mentioned," which the court held to be good.

In 3 How., 227, the verdict was for "\$500 and 14 cents, the amount of the promissory note in said plaintiff's declaration, mentioned," which was sustained on error.

In 1 S. & M., 379, the court say, "In regard to verdicts, if the error be in matters of substance it cannot be corrected by the court after the discharge of the jury from the consideration of the cause (Graham's Pr., 661; 7 Cow., 29); at all events without their concurrence. *Prussel v. Knowles*, 4 How., 90."

In 4 How., 90, the court permitted the jury after their discharge from the case, and after they had retired from the room, to return and correct a mistake in their verdict.

Presumptively, in the case before us, the verdict was "put in form" in the presence of the jury and with their assent. As it was only the calculation of interest, and as no complaint is made of errors in the calculation, or in the amount of the judgment, we shall not hold this to be error, though we are unwilling to create precedents of this character.

5. The last cause of error complains that the court erred in overruling defendant's motion for a new trial. Except upon the weight of evidence, we have already considered all the questions raised by this motion. Upon this point we simply say, that upon the whole record, we think the court erred in overruling the motion for a new trial.

We send this case back in the hope that upon another trial the developments will leave no doubt touching the signature.

The judgment is reversed and the cause remanded.

## Statement of the case.

## NATHAN USHER v. W. H. MOSS.

1. LANDLORD AND TENANT. — Where the tenant continues to occupy, and enters upon another year without objection from the landlord and with his silence or tacit consent and approval, a tenancy for another year is thus created, and cannot be terminated in the middle of the term, and in the midst of the crop, but only at the end of the year. Rev. Code, 1871, §§ 1640-1646.
2. SAME — CASE IN JUDGMENT. — The jurisdiction conferred on justices of the peace, by Rev. Code, 1871, § 1646, under which the proceeding at bar was instituted, is held to be special, as contradistinguished from the jurisdiction given by the constitution, and therefore not necessarily embraced within the constitutional provision. But the right of appeal given by the constitution is thereby "secured under such rules and regulations as shall be prescribed by law." The judgment of the circuit court is obtained in the cases arising between landlord and tenant before a justice of the peace by *certiorari* awarded by the circuit court and in no other way. Rev. Code, 1871, § 1660. And it is not error in the circuit court in such cases to dismiss an appeal.

ERROR to the Circuit Court of Alcorn County. Hon. ORLANDO DAVIS, Judge.

Defendant in error brought suit on the 10th of June, 1872, against plaintiff in error, before K. M. Harrison, justice of the peace in Alcorn county, in an action of unlawful detainer, to recover possession of a house and about forty acres of land (described in the proceedings). On the 14th of June, 1872, and on the day set for the trial, the defendant Moss moved to dismiss the cause, and set up five separate and distinct grounds. The motion to dismiss was overruled. On the 17th of June, 1872, the justice of the peace issued a *writ of venire*, and impaneled a jury to try the issue, and the jury found for the plaintiff. On the 18th of June, 1872, the defendant prayed and obtained an appeal to the circuit court.

At the October term of the circuit court of Alcorn county, the appellee in that court filed his motion to dismiss the appeal and discharge the *supersedeas*, both of which motions were sustained,

---

Opinion of the court.

---

from which judgment of the circuit court, the case is brought here upon a writ of error.

The following are assigned for errors :

1. The circuit court erred in sustaining the motion to dismiss defendant's appeal.

2. The circuit court erred in overruling defendant's motion to dismiss the suit.

3. The circuit court erred in sustaining plaintiff's motion to vacate and discharge the *supersedeas* granted by Hon. R. B. Boone, one of the circuit judges of the state.

4. The magistrate's court erred in overruling the defendant's motion to dismiss the suit of the plaintiff.

*W. H. Kilpatrick*, for plaintiff in error.

TARBELL, J., delivered the opinion of the court.

This case comes to this court from proceedings before a justice of the peace, under § 1646 of the code, by a landlord to remove his tenant, in the summary mode therein provided.

The affidavit of the landlord on which the proceedings were based set forth, "that in the year A. D. 1871, affiant rented to one Nathan Usher, for that year, the following described premises, to wit," (describing them); "that the said Nathan Usher holds and continues in possession of the said house and about one half of said cleared land, after the expiration of his term, without the consent of affiant, who is the landlord thereof, and entitled to the immediate possession of the same. Affiant therefore prays that a warrant may issue for the removal of said Nathan Usher from said demised premises, according to the statute in such cases made and provided."

This affidavit was made June 10, 1872. A summons issued returnable the 14th of that month.

The tenant appeared before the magistrate, and moved to dismiss the cause on the following grounds:

"1. Because there is no such notice on file in the papers as

---

Opinion of the court.

---

required by the statute, terminating the tenancy of the defendant.

"2. Because the affidavit of the plaintiff does not state that the necessary notice has been given to determinate the defendant's tenancy.

"3. Because the facts stated in the plaintiff's affidavit show that the defendant's tenancy is from year to year.

"4. Because the plaintiff's demand for the possession of the premises mentioned in the affidavit of the plaintiff is made at a time that would be greatly prejudicial to the defendant.

"5. Because the summons issued by the magistrate shows that it was issued on the 9th day of June, 1872, which was on Sunday, and therefore void."

This motion was overruled, and for answer, the defendant says, he was "in possession of said house and one half of said cleared land under a verbal contract for the lease, use and occupation of the said premises for the year 1872, made with the plaintiff in the latter part of the year 1871, and reiterated, ratified and confirmed by the plaintiff with the defendant in February, 1872."

There was a jury, and verdict for plaintiff.

The evidence is not given in the record. The defendant prayed an appeal to the circuit court, which was allowed by the magistrate.

In the circuit court, there was a motion by the landlord to dismiss the appeal, as follows :

"W. H. Mass, by attorneys, moves the court to dismiss the appeal in this cause because :

"1. The suit in the court below was brought by the said W. H. Moss, as a landlord or lessor, against the said Nathan Usher, as tenant for a year, holding over and continuing in possession of the demised premises after the expiration of his term, without the permission of the landlord, in which case no appeal lies to this court except by *certiorari*.

"2. Because there is no *certiorari* awarded by the circuit court in said cause."

---

Opinion of the court.

---

And there was a motion by the tenant to dismiss the cause in the precise words and for the causes stated in the like motion before the magistrate. The circuit court overruled the motion to dismiss the cause, but sustained the motion to dismiss the appeal, and thereupon entered judgment as follows: "It is therefore considered by the court that the said appeal be dismissed, and that the said Nathan Usher and C. W. Bell and A. J. Morgan, sureties on his appeal bond, pay the costs of this court for which execution may issue, and that a *procedendo* issue to the justice of the peace, R. M. Harrison, to carry out the judgment rendered before said justice."

From that judgment of the circuit court, the tenant prosecuted a writ of error, and it is submitted here, that the court below erred in overruling the motion to dismiss the cause and in sustaining the motion to dismiss the appeal.

Two questions of great practical importance are contained in this record: 1. Was this a tenancy from year to year, and if so, did the magistrate err in overruling the motion to dismiss the cause? 2. Did the circuit court obtain jurisdiction by the appeal, or was the party limited to a *certiorari* to take up the record?

1. The tenancy, according to the affidavit of the landlord, was from year to year, and this could be terminated only at the end of the year, unless stipulated otherwise in the contract. Where the tenant continues to occupy and enters upon another year without objection from the landlord, and with his silence or tacit consent and approval, a tenancy for another year is thus created, and cannot be terminated in the middle of the term, and in the midst of the crop, but only at the end of the year. Code, §§ 1640, 1646; Smith's Landlord and Tenant, 55, 301; 4 Wend., 327; Greenleaf's Crim., 281; Washburn on Real Property.

With reference to the mode of taking the cause from the justice's court to the circuit, it is urged that the right of "appeal" in all cases from the judgment of a justice of the peace is secured by sec. 23, art. 6, of the Const., which is as follows: "A compe-

---

Opinion of the court.

---

tent number of justices of the peace and constables shall be chosen in each county, by the qualified electors thereof, by districts, who shall hold their office for the term of two years. The jurisdiction of justices of the peace shall be limited to causes in which the principal of the amount in controversy shall not exceed the sum of one hundred and fifty dollars. In all causes tried by a justice of the peace, the right of appeal shall be secured, under such rules and regulations as shall be prescribed by law."

The jurisdiction conferred on justices of the peace by the Code, § 1646, under which the proceeding at bar was instituted, is held to be special, as contradistinguished from the jurisdiction given by the constitution, and therefore not necessarily embraced within the constitutional provision. But, the right of appeal given by the constitution is thereby "secured, under such rules and regulations as shall be prescribed by law."

The judgment of the circuit court is obtained in the cases arising between landlord and tenant before a justice of the peace by *certiorari* awarded by the circuit court, and in no other way. Code, § 1660. Hence, the latter court did not err in dismissing the appeal. It did err, however, in rendering judgment, on dismissing the appeal, against the appellant, and his sureties on the appeal bond, and in awarding a *procedendo*. The circuit court dismissed the appeal for want of jurisdiction of the cause, yet assumed jurisdiction to award the judgment heretofore copied. This was inconsistent, and the judgment was unauthorized.

It is suggested that, if not bound by the statute of limitations, the tenant may yet prosecute a writ of *certiorari* to the judgment of the magistrate, which, upon the record, was erroneous.

As to notice to terminate tenancy, see Code, § 1640. Whether notice was "required" in the case at bar is not supposed to arise on the record. *Vide*, authorities, *supra*.

The judgment of the circuit court, so far as it dismissed the appeal, is affirmed, but is reversed as to the judgment on the appeal bond.

---

Syllabus.

---

## JOSEPH E. DAVIS et ux. v. LIZZIE HAMILTON, Adm'x, etc.

1. **CHANCERY COURT—VENDOR'S LIEN.**—H. sold to E. a tract of land in Hinds county, for \$21,079.60, by installments, for which E. executed his several promissory notes. H. executed a deed; the notes were described in the deed, and expressly made a lien on the land. The deed was properly acknowledged and recorded. Afterwards E. became indebted to H. in the further sum of \$928.75; for a different consideration, and not secured by lien. Upon this latter note H. sued, obtained judgment, had the land sold, and D. became the purchaser. H. filed his bill on the notes against E. and D., to enforce the vendor's lien, and to subject the land to sale therefor. *Held*, that neither judgment creditors nor purchasers at sheriff's sale, deriving rights by operation of law, are to be regarded as purchasers for a valuable consideration, but mere volunteers in contemplation of a court of equity.
2. **SAME—SAME—EXPRESS LIEN—EQUITY OF REDEMPTION.**—Where a lien on land conveyed is expressly reserved in the deed, which was duly recorded, it creates a clear equitable mortgage, of which every one is bound to take notice, and the purchaser of such land at sheriff's sale, will take nothing more than an equity of redemption, and take the land subject to the lien for the unpaid purchase money. In this state the equity of redemption in property mortgaged or conveyed by deed of trust is not subject to sale under an execution at law, emanating from a judgment rendered for the debt secured by the mortgage or deed of trust. *Carpenter v. Bowen*, 42 Miss., 52. The equity of redemption is the excess of the value of the property conveyed over and above the debt secured by the mortgage, and the purchaser thereof stands in the shoes of the debtor, and takes the property subject to the incumbrance, which must be paid off and discharged in order to perfect the title to the same.
3. **SAME—SAME.**—Where a purchaser at execution sale suffers the land to be sold under a decree of foreclosure, he will only be entitled to what remains of the proceeds of the sale after the payment of the debt secured, and if there is no excess, he gets nothing; the maxim of *caveat emptor* applies.

APPRAL from the Chancery Court of Hinds County. Hon. E. W. CABANISS, Chancellor.

The facts in the case are substantially stated in the opinion of the court.



---

Brief for appellants.

---

*T. J. & F. A. R. Wharton*, for appellants :

If it was the intention of C. D. Hamilton to defraud whoever might become the purchaser of the lands under the execution sale in his favor, he thereby forfeited all right to enforce his lien as vendor of these lands as against such purchaser at the execution sale, and all right to the aid of a court of equity for any of the relief prayed for in the original bill. This is fully sustained by the high court to the following effect :

Before a party can entitle himself to any aid from a court of equity, he must show that he had done equity, or offered to do it.

Courts of equity abhor frauds, and will not lend their aid to enforce a fraud, *even as between fraudulent actors*.

A complainant must come into a court of equity uncontaminated by fraud, and with clean hands, as such court will not grant relief to a party *when the facts of the case are even sufficient to cast a suspicion of fraud or unfairness upon his action*.

"It is a familiar principle of equity that a man shall not be allowed to avail himself of an unconscientious advantage acquired over his adversary."

"Every one who engages in a fraudulent scheme forfeits all right to protection, at law or in equity."

Courts of equity will not grant relief, where the equities between the parties are even equal.

Again, positive proof of fraud is not required to defeat a party, but circumstances which afford a strong presumption of fraud will be sufficient, *and courts of equity do not require the same amount of proof of fraud as is required by courts of law*.

Boyd v. Thornton, 13 S. & M., 338, on pp. 344-345; Sugg v. Thrasher, 30 Miss., 135, on p. 142; McLoskey v. Gordon, 26 ib., 260, on p. 273; Hogan et al. v. Burnet et al., 37 ib., 617, on p. 631; Parkhurst v. McGraw, 24 ib., 134, on p. 136; 1 Story's Equity, § 190; Foxworth v. Bullock, 44 Miss., 458, on p. 465.

An estoppel, affecting the rights of a person in real estate, may be created by matter *in pais*, such as acts and declarations.

---

 Brief for appellants.
 

---

The owner of property will be estopped from setting up his title against a person who has become a purchaser of it by reason of his acts or representations; even if such were not the result of fraud, but only of his ignorance or folly.

In support of this position, we present the following authorities, to wit: *Magee v. Mellon*, 23 Miss. Rep., 535; *Nixon's heirs v. Carco's heirs*, 28 ib., 414, 430-1; *Dickson et al. v. Green*, 24 ib., 612, 618; *John Heard v. Chas. Hull*, 16 Pick., 457-462; *Jackson ex dem. Ireland v. Hall*, 10 Johns, 481; *Whiting v. Dearing*, 15 Pickering, 428; *Shapley v. Rangely*, 1 Woodsbery, 213; *Kinny v. Farnsworth*, 17 Conn., 355; *Brown v. Wheeler*, ib., 345; *Davis v. Tingle*, 8 B. Mon., Ky., 539; *Upshaw et ux. v. Hargrove*, 6 S. & M., 286, 291-2; *Stroble v. Smith*, 8 Watts, Pa., 280; *Thompson v. Sanborn*, 11 N. H., 201; *Foxworth v. Bullock*, 44 Miss., 457-465.

The acts, declarations and threats which induced Hamilton to pay the bid for the land, estop complainant from any relief against appellants, as would have done the acts of Hamilton, and especially so, if the latter assented thereto, or did not, when fully informed in these respects, object thereto: *Wenans & January v. Lindsey*, 1 How., Miss., 577-8; *Clark v. Kingsland*, 1 S. & M., 248, 256; *Miller, use, etc., v. Scott*, 2 ib., 81, bot. p. 82; *Hiller v. Ivey*, 37 Miss., 431-433; *Miss. Cent. R. R. v. Whitehead*, 41 Miss., 225-8.

The receipt of the money with knowledge of the fact that it was paid after return day, and the delivery of the deed by the sheriff, and the notice by Hamilton, estop the appellant from objecting to such payment or to the validity of the deed of the sheriff; and, as to having such payment and deed, are as valid as if made on the day of the execution sale. See authority cited, *supra*, *McFarland v. Wilson*, 2 S. & M., 269-284; *Crane v. Bedwell*, 25 Miss., 507, 511-12; *Harson v. Field*, 41; ib., 712, 715-16.

A court of equity will not permit the same party to have double satisfaction out of the same property, under different liens

---

Brief for appellee.

---

held by him, *unless* at the sale under the junior lien express notice be given of the superior or senior one, and that the sale under the junior one is to be subordinate to his right to sell, under such senior lien, especially when the property is sold under the junior lien for its value, and as though there was no other lien upon it, and without notice of such superior lien. *Boon v. Barnes*, 23 Miss., 136, 138-140.

A fee simple in lands passes by a sheriff's deed, unless a less estate be specially advertised, and sold by him. *Doe ex dem. Cocke v. Lane*, 3 S. & M., 763-779; *Jackson v. Hall*, *supra*, 10 Johns., 492.

Appellant should have returned the money paid, to claim relief. *Trotter v. White*, 26 Miss., 88, 89; *Grant v. Floyd et al.*, 12 S. & M., 191, 222; *Harrison v. Field*, 41 Miss., 712-716.

*John Shelton*, for appellee, filed an elaborate brief, too lengthy for insertion, and made the following points and references:

1. The answer of Davis waived the demurrer to the bill of complaint. See *Story's Eq. Pl.*, sec. 442; *Robinson v. Francis's adm's*, 7 How., 458; *Baine v. McGee*, 1 S. & M., 208; *Fall v. Hafter*, 40 Miss., 606; *Pieri v. Shieldsboro*, 42 ib., 493.

2. If not so waived, the demurrer was at any rate properly overruled. See *Nailor v. Fisk*, 27 Miss., 256; 1 *Lomax on Real Estate*, 392; 4 *Kent's Com.*, 179, etc.; *Kilcrease v. Sum and wife*, 36 Miss., 569; *Stewart v. Ives*, 1 S. & M., 197; *Upshaw v. Hargrove*, 6 ib., 291; *Stratton v. Gold*, 40 Miss., 778, etc.; *Harvey v. Kelly*, 41 ib., 490, etc.; *Code of 1857*, 310, sec. 24; 4 *Kent's Com.*, 174; 2 *Kent's Com.*, 630; *Bank U. S. v. Davis*, 2 Hill, 451, etc.; 14 *Vesey*, 273; *Sugden on Vendors*, 534; *Ireland v. Hall*, 10 Johns., 480; *Planters' Bank v. Scott*, 5 How., 246; *Anderson v. Carlisle*, 7 ib., 408; *Wood v. Robinson*, 3 S. & M., 271; *McFarland v. Wilson*, 2 ib., 269; *Lehr v. Rogers*, 3 ib., 468; *Crane v. Bedwell*, 25 Miss., 507.

3. The testimony of J. E. Davis, one of the respondents, is not to be governed by the rules applicable to that of a disinterested

## Brief for appellee.

witness. See art. 190, on page 570 of Code of 1857; *Wolfe v. South Ex. Co.*, 41 Miss., 79.

4. The special lien, reserved in words in the very body of the deed from Hamilton and wife to Evans, is equivalent to a mortgage, and notice, when filed for record, to all the world. See Code of 1858, art. 23, 310; *Kent's Com.*, vol. 4, 174, etc.; *Stratton v. Gold*, 40 Miss., 778, etc.; *Harvey v. Kelly*, 41 ib., 490, etc.

5. If the lien once existed, its continuance was to be presumed till it was shown to have been discharged or satisfied, or the remedy to enforce it barred by lapse of time. See *Stewart v. Ives*, 1 S. & M., 197; *Upshaw v. Hargrove*, 6 ib., 291; *Hill v. Boyland*, 40 Miss., 618, etc.

6. The respondent, J. E. Davis, had actual notice of the lien, and his wife and corespondent is bound by all the acts, knowledge and purposes of her husband and agent. See 1 *Loman on Real Estate*, 392; 4 *Kent's Com.*, 179, etc.; *Nailor v. Fisk*, 27 Miss., 256; *Kilcrease v. Lum and wife*, 36 ib., 569; 2 *Kent's Com.*, 630, etc.; 2 *Tucker's Com.*, 447; *Bank U. S.*, 2 *Hill*, 451, etc.; 14 *Vesey*, 273; *Sugden on Vendors*, 46; *Munn v. Commission Co.*, 15 *Johns.*, 44; *Central Railroad v. Whitehead*, 41 Miss., 225.

7. The power of an attorney-at-law to bind his client is confined to the very cases in which he held that relation. See 1 *Greenleaf on Evidence*, sec. 186; 2 *Phillips on Evidence*, 181; 2 *Starkie on Evidence*, 135, etc.; *Head & Davis v. Gervois & Morse*, Walk., 431; *Wenans & January v. Lindsey*, 1 *How.*, 577; *Clark & Co. v. Kingsland*, 1 S. & M., 248; *Brewer v. Harris*, 2 ib., 84; *Gasquet, Parish & Co. v. Warren*, 2 ib., 514; *Garvin et al. v. Lowry*, 7 ib., 24; *Hiller v. Ivey*, use, etc., 37 Miss., 431.

8. A purchaser of land at sheriff's sale only acquires such title as was, at the time, vested in the defendant in execution, and subject to all the equities to which it was liable in his hands. See 2 *Story's Eq. Jur.*, sec. 1217, etc.; 1 ib., note to sec. 411; 4 *Kent's Com.*, 158; Code of 1857, art. 26, 311; *Upshaw v. Hargrove*, 6

---

Opinion of the court.

---

S. & M., 236; Kilpatrick v. Kilpatrick, 23 Miss., 124; Kelly v. Mills, 41 ib., 267; Jackson v. Hall, 10 Johns., 480.

9. A sheriff has no power or authority to receive money, or to make a deed, after the return day of an execution under which land has been sold. See *Planters' Bank v. Scott*, 5 How., 246; *Anderson v. Carlisle*, 7 ib., 403; *McFarland v. Wilson*, 2 S. & M., 269; *Wood v. Robinson*, 3 ib., 271; *Lehr v. Rogers*, 3 ib., 463; *Crane v. Bedwell*, 25 Miss., 507.

10. There was no need that Hamilton, with his bill of complaint, should have tendered back to Davis and wife the amount bid for the land and paid to the sheriff. See *Grant v. Lloyd*, 12 S. & M., 191, etc.; *Trotter v. White*, 14 ib., 33; *Fonblanque's Equity*, top pages 43, 128 and note\*; 1 *Story's Eq. Jur.*, sec. 640.

11. The doctrine of estoppel has no application to this case. See 1 *Greenleaf on Evidence*, sec. 206, etc.; 1 *Starkie on Evidence*, 304, etc.; 2 *Phillips on Evidence*, 200, etc.; *Dickson v. Green*, 24 Miss., 618; *Nixon v. Carco*, 28 ib., 431; *Wendell v. VanRenssalaer*, 1 Johns. Ch., 153; *Jackson v. Hall*, 10 ib., 480.

12. The letter of Hamilton to Davis, containing an offer of compromise, which was never accepted or acted on in any way, was not binding on the former, nor is it binding on his administratrix, the appellee here. See 1 *Greenleaf on Evidence*, sec. 122 and notes; 2 *Phillips on Evidence*, note 196, 218; *Laurence v. Hopkins*, 13 Johns., 288; and the numerous cases cited by *Greenleaf* and *Phillips*, in the sections and on the pages just cited.

PEYTON, C. J., delivered the opinion of the court:

This is an appeal from a decree of the chancery court of Hinds county, subjecting certain lands in said county to the payment of the consideration money under a lien reserved in the deed of conveyance. The facts of the case are substantially as follows: On the 22d day of May, 1860, one Charles D. Hamilton sold and conveyed to John Evans a certain tract of land situated as above stated in said county of Hinds for the sum of \$21,079.60, and to

---

Opinion of the court.

---

secure the payment of the purchase money, the said Evans executed and delivered to said Hamilton his four promissory notes, bearing even date with the deed of conveyance of said land; the first for \$10,539.80, payable on the 1st day of January, 1861; the second for \$3,513.27, payable on the 1st day of January, 1862; the third and fourth for like sums, payable on the 1st day of January in 1863 and 1864. These notes are described in the deed of conveyance, and therein expressly made a lien upon the lands thereby conveyed. The deed was duly acknowledged and filed in the proper office of said county for record on the 20th day of June, 1860, and recorded on the 25th day of the same month.

On the 25th day of March, 1861, the said John Evans, for a different consideration, made and delivered to the said Charles D. Hamilton his certain other promissory note for the sum of \$928.75, payable on the 1st day of January, 1862. Upon this note the said Hamilton obtained a judgment at the November term, 1866, of the circuit court of Hinds county, against the said Evans, for the sum of \$1,476. Upon this judgment an execution was issued and levied upon the land conveyed as aforesaid, which was struck off at the sheriff's sale to Joseph E. Davis, in the name and behalf of his wife, Amanda E. Davis, as her agent, at the sum of \$910, on the first Monday of June, 1867, being the return day of said execution. This bid the said Amanda E. Davis, by her said agent, declined to pay, on the ground that the land was subject to the vendor's lien for the unpaid purchase money. After the return of the execution, on the 16th day of August, 1867, the amount of said bid was paid by the said Joseph E. Davis for his wife, to the sheriff, who then executed to Mrs. Davis a deed for said land.

The notes given for said land remaining unpaid, the said Charles D. Hamilton filed his bill in the chancery court of the said county of Hinds, in 1867, against the said John Evans, Joseph E. Davis and Amanda E. Davis, to enforce the lien expressly reserved in his deed, and to subject the land to the payment of the unpaid purchase money, praying that unless the amount found to be due,

---

Opinion of the court.

---

the complainant be paid by a short day, the said land may be decreed to be sold to pay the same, or so much as may be necessary for that purpose.

To the bill of complaint the defendants, Davis and wife, demurred, and the demurrer was overruled by the court, and leave to answer was granted to said defendants, who answered and made their answer a cross bill, praying that the complainant may be forever barred and precluded from enforcing his vendor's lien as prayed for in his bill, and that the same may be dismissed.

The death of said complainant, Hamilton, having been suggested, the suit was revived in the name of Lizzie Hamilton as administratrix of his estate, who in her answer to the cross bill denies all knowledge of the facts therein stated, and prays for the enforcement of the lien, as sought in the prayer of the original bill.

John Evans having failed to answer the bill, a *pro confesso* was taken as to him, and the cause having been heard on the bill, *pro confesso*, cross bill, answers, exhibits and testimony, the court decreed that unless the sum of money due the complainant for the unpaid purchase money on said land, be paid within thirty days from the date of the decree, the land be sold, and out of the proceeds of the sale, that the sum paid by Amanda E. Davis on the purchase of said land at the sheriff's sale, with interest thereon at the rate of ten per cent. per annum from the time of payment to the sheriff, until payment to her, be first paid to her, and that the balance of the proceeds of said sale be applied to the payment of the amount found due to the complainant, or so much thereof as may be necessary to satisfy the same, and costs of suit, and that the conveyance of said land made by the sheriff to said Amanda E. Davis, on the 16th day of August, 1867, shall be and stand from the time of such payment, annulled and held for naught. And hence the cause comes to this court on the part of the defendants, Joseph E. Davis and Amanda E., his wife, who assign for error:

1. That the court below erred in overruling the demurrer of Davis and wife to the bill of complaint.

---

Opinion of the court.

---

2. That the court below erred on final hearing in granting any relief to complainant.

3. That the court below erred in decreeing the sheriff's deed to Mrs. Davis, one of the appellants, to be annulled and held for naught upon the contingency therein stated.

In support of the first assignment of error the counsel for the appellants insist that the bill of complaint was fatally defective in not averring that Mrs. Davis had notice of the vendor's lien previous to her purchase under the execution. This objection to the bill would have been good, had Mrs. Davis been a *bona fide* purchaser. But it has been held by our predecessors in the case of *Kelly v. Mills*, 41 Miss., 280, that neither judgment creditors nor purchasers at sheriff's sale, deriving rights by operation of law, are to be regarded as purchasers for a valuable consideration, but as *mere volunteers* in contemplation of a court of equity. There was no error, therefore, in overruling the demurrer.

The second assignment of error calls in question the right of the vendor to enforce his lien upon the land conveyed to Evans for the unpaid purchase money. Even had there been no express lien reserved in the deed of conveyance to Evans, Mrs. Davis would have been a purchaser of the land subject to the implied lien for the purchase money. If this be so, *a multo fortiori*, must the express lien reserved in the deed, which fixes Mrs. Davis with notice, prevail against her claim derived through the sheriff's deed. The lien upon the land conveyed being expressly reserved in the deed, which was duly recorded, was clearly an equitable mortgage, of which every one is bound to take notice. *Stratton v. Gold*, 40 Miss., 781. Mrs. Davis bought nothing at the sheriff's sale but an equity of redemption. She took the land, subject to the lien, for the unpaid purchase money. And Hamilton had an undoubted right to enforce his lien in a court of equity by subjecting the lands to the payment of the purchase money. Hamilton had a perfect right to sue in a court of law upon the note not secured by any lien on the land, before he filed his bill to enforce



---

Opinion of the court.

---

the lien on the land conveyed for the payment of the notes secured, and his having done so is no fraud on Mrs. Davis, nor does it furnish any ground to infer fraud.

The case of *Jackson v. Hall*, 10 John., 481, so much relied on by counsel on both sides of this case, so far as it authorizes a creditor, whose debt is secured by mortgage, to purchase the mortgage property under an execution emanating from a judgment at law, upon the debt thus secured, is not recognized as good law in this state. In this state the equity of redemption in property, mortgaged or conveyed by deed of trust, is not subject to sale under an execution at law, emanating from a judgment rendered for the debt secured by the mortgage or deed of trust. *Carpenter v. Bowen*, 42 Miss., 52.

We think there is no error in the decree of the court so far as it directs the sale of the land for the payment of the unpaid purchase money and interest.

With respect to the third assignment of error, the counsel for the plaintiffs in error contend that Mrs. Davis had a right to retain her deed and redeem the land by paying the purchase money. This would have been so had she perfected her purchase by paying her bid and taking a deed from the sheriff before the expiration of the return day of the execution. In that event she would have been a purchaser of the equity of redemption, and have taken the land subject to the lien, with the right to redeem, and would hold the property under the sheriff's deed. The equity of redemption is the excess of the value of the property conveyed, over and above the debt secured by the mortgage, and the purchaser thereof stands in the shoes of the debtor, and takes the property subject to the incumbrance, which must be paid off and discharged, in order to perfect the title to the same. And had Mrs. Davis, as a purchaser at the sheriff's sale, suffered the land to be sold under a decree of foreclosure, she would only have been entitled to what remained of the proceeds of the sale after the payment of the debt secured, and if there was no excess, she got nothing. *Caveat emptor* is a maxim applicable to all judicial sales.

## Syllabus.

Whether Mrs. Davis acquired any title under the sheriff's deed, is a question which we deem it unnecessary in this case to decide. It seems to be conceded, on both sides, that the land is not worth the amount of money remaining due as an incumbrance, upon it, and therefore there could be no excess upon the sale under the decree. But if Mrs. Davis acquired no title under the sheriff's deed, the money paid by her to the sheriff, which was received by Hamilton's attorney at law, and applied to the payment of his debt, created a lien in equity on the land in her favor for reimbursement, even had she acquired a title to the property by the sheriff's deed, and therefore been entitled to redeem. It will be seen by reference to the decree that she is not deprived of that right. The decree gives thirty days for redemption, and that the deed to Mrs. Davis shall be annulled only *from the time of the reimbursement* to her of the money received by the sheriff, and appropriated as aforesaid to Hamilton's use.

The decree in any aspect of the case in which it can be viewed is most favorable to Mrs. Davis, and if there be any error, it is such as she has no right to complain of.

The decree will be affirmed.

## JACKSON WARREN v. TRUSTEES OF AFRICAN BAPTIST CHURCH.

1. UNLAWFUL DETAINER — SPECIAL COURT. — The special court authorized by the statute has its duties, powers and jurisdiction defined and limited by the statute by which it is created, and when a final judgment is rendered in the case for which it is organized, the court is then dissolved. It has no jurisdiction to try any case except forcible entry and unlawful detainer. It has no power to grant a new trial, but may grant appeals when the party applying for the appeal conforms to the requirements of the law. The right to set aside a verdict and grant a new trial is incident to and inherent in all courts of original general common law jurisdiction, such as the circuit courts of this state. The power belongs to them independent of statute. The reverse is the rule as respects inferior and special courts.

---

Briefs.

---

2. SAME — APPEAL BOND — CASE IN JUDGMENT. — Where an appeal is taken from the special court and the bond is conditioned that the appellant "shall prosecute said appeal with effect, or in case of failure therein, shall pay and satisfy the amount of said judgment according to the considerations of the said appellate court, and perform and satisfy its judgment," *held*, that this is not sufficient. The condition required by statute is "for the payment of the costs before the said justices, and of all costs that may accrue in the circuit court in case the appellant shall fail therein." "The appeal shall not operate as a supersedeas."

ERROR to the Circuit Court of Madison County. Hon. W. B. CUNNINGHAM, Judge.

The facts in the case are sufficiently set forth in the opinion of the court.

*Campbell and Calhoun*, for plaintiff in error.

The appeal was not taken in time. The appeal bond does not comply with the law literally nor substantially. Rev. Code 1857, p. 353; Rev. Code 1871, § 1594.

The special court organized to try unlawful detainer cases cannot entertain a motion for a new trial. The cause was tried by a jury, under the Code of 1857. The court is the mere creature of the statute, and has no power except that conferred upon it by the statute law of its creation, and that law is silent as to any power to hear motions for or grant new trials. See Rev. Code, 1857, p. 351. Mistrials are provided for, but not new trials. So much is the law bent on a *rapid summary* trial of the right of immediate possession, that it refuses *supersedeas* on appeal.

The power to grant new trials is not inherent in inferior courts. Hilliard on New Trial, ch. 1, sec. 2.

This court being convened for a special purpose, can make no record after final judgment. *Busby v. Grayham*, 26 Miss., 210.

*F. B. Pratt*, for defendant in error:

Records will be construed according to established rules of construction. "Courts will give a record such construction as will make it sensible and consistent, and not one which is wholly absurd." *Henry v. Hoover*, 6 S. & M., 418; *Wooton v. Wingate*, 6 S. & M., 274.

---

Opinion of the court.

---

The court was not limited as to time in the trial of causes. "The court may adjourn from day to day, and from time to time, until the trial shall be ended." Code 1857, p. 351, art. 10.

We contend that the court *had* the power to grant a new trial in the cause, and that the motion was properly entertained, and that the cause was not determined and no final judgment rendered until the motion was disposed of.

The power to grant new trials is inherent in courts of law of general jurisdiction. The authority is not derived from statutes, but from the common law. Blackstone says: "The origin of the practice of granting new trials is concealed in the night of time." The year book gives instances of new trials being granted as early as 1351, and the practice has been followed to the present time by courts of law. Graham on New Trials. Hilliard on New Trials, pp. 1, 2, 3. And see also *Bartling v. Jamison*, 44 Mo., 141. It is inherent in courts of general jurisdiction, not given but regulated by statute. 12 Minn. Rep., 393; *The State v. Hill*, 48 Maine, 241.

It is now too late for plaintiff to object to the proceedings in the court of unlawful detainer, having acquiesced in the same at the time without objection, should now be estopped. *Weaver v. Lasher*, 1 Johnson (N. Y.), 241; *Fiero v. Renolds*, 20 Barbour, 276; *Kelmor v. Sudam*, 7 Johnson, 530; *Barnes v. Badger*, 41 Barbour, 101.

SIMRALL, J., delivered the opinion of the court.

Jackson Warren made oath that the trustees of the African Baptist Church detained from him certain premises, and thereupon the justice of the peace issued the summons, directed by the statute, on the 19th of July, 1871.

The transcript of the special court, composed of the magistrates and jury, filed in the circuit court, shows that this court was organized the 9th of August, 1871, and as the transcript states, on account of absence of witnesses, adjourned until Monday, the 4th

---

Opinion of the court.

---

day of August. This must be a clerical error intended for the 14th, for the next entry is, "August 14th, 1871. Court met pursuant to adjournment." A jury was empaneled and the trial entered upon. Adjournments were made from day to day, until the 16th, when the jury failing to agree, they were discharged, and the court then adjourned until the second Monday in September, 1871.

The court again met on the day appointed, and because of the absence of witnesses, adjourned until the 25th. On that day the trial was begun, which terminated in a verdict and judgment for the plaintiff. The entry closes thus: "Motion for new trial filed by counsel for defendants; ordered, that the court adjourn until court in course."

The last entry in this transcript is: "Nov. 27th, 1871. Court met pursuant to adjournment." "This cause coming on this day, to be heard on motion for new trial, \* \* \* it is therefore considered that said plaintiff retain said property in controversy," \* \* etc. The defendants prayed an appeal on 28th November, which was granted on their entering into bond.

A motion was made in the circuit court to dismiss, because:

First. The appeal was not prayed and bond given within the time required by law.

Second. The bond is not conditioned according to law.

It is assigned for error here, that the circuit court erred in overruling that motion, and assuming jurisdiction to try the case.

The organization of the special court, and the mode of procedure and trial, is defined by statute. Code, 1857, pp. 349, 350, 351 to 354, inclusive. The 18th article gives an appeal to the circuit court, on the terms of executing the bond within five days after the rendition of the judgment.

If the trial terminated in the verdict and judgment on the 27th of September, the appeal prayed and granted in November, more than 60 days afterwards, was too late.

The transcript certified by the circuit court contains nothing

---

Opinion of the court.

---

more touching the motion for a new trial, except what has been before recited. It seems to be conceded by counsel, however, that the transcript before us contains that motion, as made the 27th of September, and it is contended that the assembling of the justices on the 28th November, was for the purpose of disposing of it, and there was no final disposition of the cause until that day, and therefore the appeal was taken in time; on the other side it is insisted that there was no power in the magistrates to entertain such a motion; that they ceased to have jurisdiction as a court after rendition of judgment on the verdict; and could not legally have adjourned to hear and determine the motion; and the record omits to show that they adjourned to the 27th of November, for that or any other purpose. If these views are correct, it is further insisted that what was done on the last named day was "*coram non judice*."

All the adjournments prior to that of September 27 were to a day certain, and accorded with the statute, allowing it "from day to day and from time to time." That order recited, "until court in course." This special court of the two justices of the peace, and jury, attended by the clerk and sheriff, is constituted under the statute, to try each separate case; and when that is ended, the court is dissolved. It has no jurisdiction than to try the plaint of "forcible entry and detainer;" its modes of procedure are expressly defined. To ascertain what it may do, we refer to the statute. That does not authorize the granting of a new trial. It is presided over by magistrates, generally unlearned in the law, incompetent to guide and instruct the jury in complicated cases; and to determine with anything like accuracy, whether the result reached has been according to law. They are not supposed to be conversant with the various considerations laid down in the books, as grounds for a new trial. The "new trial," provided by the statute for the party aggrieved by the verdict and judgment is in the circuit court, to which the cause may be removed, for a trial *de novo* "on the merits." Little is to be found in the books, on

---

Opinion of the court.

---

the subject of granting new trials by courts of inferior and limited jurisdiction. Probably for the reason that such courts have seldom attempted to exercise such power. The right to set aside a verdict and award another trial, is incident to and inherent in all courts of original general common law jurisdiction; such as the circuit courts in this state. The power belongs to them independently of statute. The reverse is the rule as respects inferior and special courts. *People v. Sessions of Chenango*, 2 Caine's Ca., 319; 1 Hilliard on New Trials, 2; *Bartling v. Jamison*, 44 Mo. Rep., 143-4. We think there was no power in the two justices of the peace, to entertain a motion for a new trial; and that if the cause had been continued to a day certain for that purpose, their action upon the motion would have been without warrant of law.

2. The condition of the appeal bond is that appellants, "shall prosecute said appeal with effect, or in case of failure therein, shall pay and satisfy the amount of said judgment according to the consideration of said appellate court, and perform and satisfy its judgment," \* \* etc. The condition required by statute, art. 17, p. 353, Code of 1857, is "for the payment of the costs before the said justices, and of all costs that may accrue in the circuit court in case the appellant shall fail therein." "The appeal shall not operate as a *supersedeas*."

The bond is conditioned as prescribed by law, for the removal of causes into this court, but does not conform to the statute applicable to this special proceeding. It is the statutory bond, executed according to the terms of the law, and within the five days after rendition of judgment, that gives jurisdiction to the circuit court to entertain the case. *Busby v. Grayham*, 26 Miss., 211. This case is also authority on the point that the justice's court having been convened for a special purpose, can make no record of proceedings after final judgment.

The judgment of the circuit court is reversed, and judgment here dismissing the cause.

## Syllabus.

## C. P. MOORE et ux. et al. v. HENRY and ANNIE LORD.

50 229  
84 757

1. **EJECTMENT — EXCEPTION IN DEED.** — Plaintiffs in error conveyed to defendant Annie Lord, by deed, of date October 14, 1861, lots Nos. 3, 4, 5 and 6, in the town of Canton, "except so much of said lot 3 as is now occupied by Owen Van Vorter, Esquire, as an office, being twenty-seven feet front on Liberty street, and running back fifty-six feet;" upon this clause in the deed, rest the right and the title of the plaintiffs. Van Vorter testifies that he was in continuous, open and notorious possession of the property in controversy (without a deed from any one) from 1855 to 1863, when he conveyed it to defendant, Mrs. Annie Lord, who has retained possession continuously thereafter. Plaintiffs rely upon the maxim, "*Si quis rem dat, et partum retinet, illa pars quam retinet, semper eo est, et semper fuit.*"
2. **SAME — SAME.** — "In every good exception, these things must always concur: 1. The exception must be by apt words. 2. It must be of part of the thing granted, and not of some other thing. 3. It must be a part of the thing only, and not of all, the greater part, or the effect of the thing granted. 4. It must be of such a thing as is severable from the thing which is granted, and not of an inseparable incident. 5. It must be of such a thing as he that doth except may have, and doth properly belong to him. 6. It must be of a particular thing, out of a general, and not of a particular thing, or a part of a certainty. 7. It must be certainly described and set down." Sheppard's Touchstone, 77.
3. **SAME — SAME — CASE IN JUDGMENT.** — Of these components of a "good exception," two are noticeable, the second and fifth, unless it can be implied; it does not appear of record that the land sued for was, at the date of the conveyance of 1861, within the meaning of the rule, "a part of the thing granted," nor that it properly belonged to the plaintiffs.
4. **SAME — SAME — STRENGTH OF TITLE.** — The general rule, that the plaintiff in ejectment must recover upon the strength of his own title, and not on the weakness of that of his adversary, is well understood. When the title of the plaintiff is controverted under the general issue, he must show, that he had the legal estate in the disputed lands, together with the right of entry. He must establish a clear and substantial possessory title, and this rule is firmly established. 2 Bouvier's Institutes, § 3674. And a somewhat close adherence to the ancient landmarks, as understood and explained herein, are deemed essential to the rights of parties, as well as to the due administration of justice.



---

Statement of the case.

---

**ERROR to the Circuit Court of Madison County. Hon. W. B. CUNNINGHAM, Judge.**

The plaintiffs in error brought their action of ejectment against the defendants in the circuit court of Madison county, to the October term, 1872, thereof, to recover a part of lot No. 3, described in the declaration, as twenty-seven feet front on Liberty street, and running back fifty-six feet, on square No. 1, in the town of Canton.

The proof shows that the plaintiffs in error, on the 14th day of October, 1861, sold and conveyed to the defendants in error, lots Nos. 3, 4, 5 and 6, in square 1, etc., "except so much of said lot No. 3, as is now occupied by Owen Van Vocter, Esq., as an office, being twenty-seven feet front on Liberty street, and running back fifty-six feet." Upon this exception the plaintiffs based their right to recover the disputed property.

The witness, Van Vocter, proved that he was in the continuous, open, and notorious possession of the parcel of land in controversy from 1855 to 1863, when he conveyed the same to Mrs. Annie Lord, and that she had been in possession of the same since that time, until the date of the trial, and that such possession was also open and notorious; that he built a printing office on the said lot, but that he had never received a conveyance from any one. It appears that the plaintiffs in error never pretended to have a deed to the premises, but relied solely upon the exception in their deed to defendants.

A judgment was rendered in the court below for the defendants, and the plaintiff brings the case to this court on a writ of error :

It is assigned for error :

1. The court erred, refusing to give the second instruction to the jury asked for by plaintiffs.
2. The court erred in granting the first, second, third and fifth instructions to the jury, asked for by the defendants.
3. The verdict of the jury is contrary to the law and the evidence.

---

Briefs.

---

*John Handy*, for plaintiff in error :

The exception in this case is in the *granting* part of the deed ; the effect of it might not extend as far as we contend for. But when one grants a thing, and immediately, in the grant excepts from its operation a parcel of the thing granted, the effect is that he grants the whole, and a part is immediately taken back by the same grant. The *whole* is first granted, but the exception operates in law to defeat the operation of the deed to pass title to the part excepted, as if a deed of defeasance had been *eo instanti* executed therefor by the one party to the other. If the exception be made in the *habendum*, or in any other part of the deed, those in the premises or granting part, its legal effect would be different perhaps ; for no other part of the deed than the granting part of it, can limit the quantity of the thing granted. It would be void for repugnance to the premises in the deed. 3 Washburn on Real Property, 369.

An exception must be such a thing as he that doth except may have, and doth properly belong to him. This is but another form of asserting the familiar principle that " nothing that is not possessed can be granted." Shepperd in the Touchstone, 77.

Defendant is estopped from denying the title of this property. Estoppels are reciprocal, and the recitals bind both parties. 3 Dana, 271.

If one recognize the title of another, he must show that he afterwards purchased it. Girault v. Zunts, 15 La., 684 ; Hemon on Estoppels, §§ 258-272.

The exception in this case was not repugnant but valid, it being a specific portion. 2 Green, Iowa, 344 ; 4 Pickering, 54 ; Griffin v. Sheffield, 38 Miss. Rep., 359 ; 8 Ohio, 226 ; 10 Metcalf, 192 ; 7 Jones, 228 ; 5 Gray, 328 ; 7 John., 169 ; 6 Cush., 56 ; 1 N. J., 541 ; 2 Hill, 557 ; 13 N. Y., 239 ; 7 Mass., 291 ; 6 Iowa, 137.

*Geo. L. Potter*, for defendants in error :

No question can be raised here in relation to alleged instructions, as the law requires all instructions to be marked as given or

---

Opinion of the court.

---

refused ; instructions so marked shall be a part of the record, without bill of exceptions. Rev. Code, 1871, § 643. There are no instructions set out in the record proper. See cases cited in George's Digest, p. 65.

The argument intended to be urged by plaintiffs against Mrs. Lord, is that this exception is an admission by implication, on her part that her grantors then owned the part occupied by Van Vocter. True the grantors make no such claim in their deed, and for aught that appears in the deed, the fact may have been one way or the other.

The facts in proof show that the grantors used the words of exception simply because they were not the owners of the part excepted. It was a brief and simple mode of *description* to show the part of lot three claimed by the grantors. Defendants proved that Van Vocter conveyed that part of the lot occupied by him to Mrs. Lord in 1863, that witness had been in possession of the land since 1855. Thus it appears that in 1861 at the date of the deed from plaintiffs, Van Vocter was in open possession of said excepted property, and so remained in possession since 1855. We admit that under a deed or grant containing words excepting from the conveyance, a part of the land described, the title of the grantor to the part thus excepted, remains in him, *providal*, that he owns the excepted part at the time, but such exception has *no effect* as to the part excepted, and the title to it remains in the owner of it, as though the deed had never been made. If this be so, of what benefit can this deed be to plaintiffs as evidence of the title in this suit.

TARBELL, J., delivered the opinion of the court.

Ejectment for part of a lot in the town of Canton, being 27 feet front by 56 feet deep, out of lot 3, square 1, as per a survey and map presented on the trial. To maintain the action on their part, the plaintiffs gave in evidence a deed from them to the delendant, Anne Lord, bearing date October 14, 1861, whereby the grantors

---

Opinion of the court.

---

conveyed to the grantee "lots 3, 4, 5 and 6 in square 1, in the town of Canton, county of Madison, state of Mississippi, except so much of said lot No. 3, as is now occupied by Owen Van Vocter, Esquire, as an office, being twenty-seven feet front on Liberty street and running back fifty-six feet," and upon this clause of the deed rests the title and the rights of the plaintiffs.

The occupation by Van Vocter of the lot now sued for at the date of the above conveyance was shown by several witnesses.

Van Vocter testified that he was in the continuous, open and notorious occupation of the parcel of land in controversy from 1855 to 1863, when he conveyed the same to defendant Mrs. Anna Lord, since when the possession of Mrs. Lord to the date of the trial was also open and notorious that he built a printing office on said parcel or lot, and that he had never received any conveyance of said lot from any one.

From the date of the conveyance from Van Vocter to Mrs. Lord, she and her husband had exercised full acts of ownership over the lot in litigation, and they were undisturbed and unmolested in such control.

Upon these facts the judge before whom the cause was tried, was asked to charge the jury, that the plaintiffs were entitled to recover; but the instructions, and the rulings of the court thereon are immaterial, as the legal question involved is presented by the facts which are undisputed and uncontradictory.

There was a verdict for the defendants upon which judgment was rendered for costs against the plaintiffs. From this judgment the plaintiffs prosecute this writ of error.

It is insisted here, as it was in the court below, that, the acceptance of the deed in this case, by the grantee, now defendant, from the grantors, now plaintiffs, was a recognition by the grantee of the grantor's title to the land involved, and that she is estopped from disputing the title of the plaintiffs at the time of the conveyance. This claim of the plaintiffs proceeds upon the theory, that, but for the exception in the deed, the whole of lot (3) would have

---

Opinion of the court.

---

passed, and by implicating title to the excepted part was in the grantor. It is claimed that this is in accordance with the maxium "*Si quis rem dat, et partem retinet, illa pars quam retinet, semper eo est, et semper fuit.*"

And reference is made to Co. Lit., 47; Sheppard's Touchstone, 77; 3 Washb. Real Prop., 369; etc. The first is not at command. In the Touchstone the following is found: "In every good exception these things must always concur: 1. The exception must be by apt words. 2. It must be of part of the thing granted, and not of some other thing. 3. It must be of part of the thing only, and not of all, the greater part, or the effect of the thing granted. 4. It must be of such a thing as is severable from the thing which is granted, and not of an inseparable incident. 5. It must be of such a thing as he that doth except, may have and doth properly belong to him. 6. It must be of a particular thing out of a general, and not of a particular thing out of a particular thing, or of a part of a certainty. 7. It must be certainly described and set down."

Of these components of a "good exception," the second and fifth are noticeable. Unless it can be implied, it does not appear by the record that the land sued for was, at the date of the conveyance of 1861, within the meaning of the rule, "a part of the thing granted," nor that it properly belonged to the plaintiffs. Title in them is not pretended to be shown, except by implication. They were not in possession nor exercising any acts of ownership. But Van Vocker was in possession, built an office thereon, and conveyed to Mrs. Lord. He was not the tenant of, nor in any way in possession under, or subordinate to the plaintiffs, the grantors. Defendants did not take possession of the lot in controversy in virtue of or under the conveyance from plaintiffs, but received possession from Van Vocker.

The case at bar seems, therefore, entirely unlike the cases put in the books by way of illustrating the rule quoted. Generally, exceptions are of mines, water courses, mill sites, roadways, and the like, palpably part and parcel of the thing granted and in the

---

Opinion of the court.

---

possession of the grantor at the time of the conveyance. Mr. Sheppard, in the Touchstone, says: "If a man grant all his lands in Dale excepting one house or one acre in certain; or one house excepting one chamber in certain, these and such like exceptions are good. And if one grant a manor excepting one tenement (*parcel of the manor*), or excepting the services of I. S. (*who doth hold of the manor*), or excepting one close, or excepting one acre, or excepting all the gross trees; these are good exceptions." So, "if one grant a messuage and all the lands and tenements thereunto belonging, excepting one cottage, this is a good exception;" because, clearly, the "one cottage" was a part of the messuage, lands and tenements granted. And this view seems to be distinctly expressed in *Thomas v. Pickering*, 1 Shepl., 351, as well as in *Darling v. Crowell*, 6 N. H., 421, and other cases.

"But if the the exception be of another thing than the thing granted; as if one grant a manor of land, excepting one acre of ground which is no parcel of the manor or of the land before granted; these exceptions are void." In the case at bar there is nothing to show that at the time of the conveyance from the plaintiffs to the defendants the land in controversy was a part of the "thing granted." So far from it, the facts developed render the presumption almost irresistible, that it was not a part thereof. Suppose it conceded, that upon the face of the deed, without extraneous facts, the implication of title in the grantors would arise. Between such a case and the one presented by the facts already recited, it will be seen there is a wide difference. Indeed, the facts present another case altogether.

Turning to Washburn on Real Property, vol. 3, p. 369, we find the following: "As an exception is the taking of something out of the thing granted which would otherwise pass by the deed, it may be said, in general terms, that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted, and the grantor in the deed made the grantee by the exception. It must, in the first place, be a

---

Opinion of the court.

---

part of the thing included in the grant, and is to be taken in substance out of that." Again, says Washburn: "When one granted, 'except as is hereinafter excepted,' it being in the granting part of the deed, was held not to be an exception out of the thing granted, but *an excluding* of such part from the grant altogether." And then is quoted the legal maxim referred to by counsel: "The effect, in such a case, in respect to the thing excepted, is as if it never had been included in the deed." *Greenleaf v. Birth*, 6 Peters, 302. The rule, as given in one of the cases is, that exceptions must be something that can be severed from what is granted. 3 Wash., R. P., 370; *School District v. Lynch*, 33 Conn., 330. The court in the latter case, make the point that the reservation was not "to the plaintiffs." And it would seem, if not essential, it is at least prudent, that the exception should be stated in the deed to be to the grantor or other person to whom the reservation is made. 3 Wash., R. P., 371; *Shep. Touch*, 100; 9 Allen, 170; 13 Met., 461.

*Greenleaf v. Birth*, 6 Peters, 302, though the point in the case at bar was not directly adjudicated, is nevertheless valuable and material by way of persuasive suggestions. The exception in the deed in that case contained an express stipulation or recognition of the title of the grantor to the excepted land. On the trial the plaintiff, who was also the grantor, deduced his title from the government to himself. Referring to the exception, the court say: "In order, therefore, to ascertain what is granted, we must first ascertain what is included in the exception; for whatever is within the exception is excluded from the grant, according to the maxim laid down in *Co. Litt.*, 47a, which is the same laid down by counsel. Thus, Judge STORY gives a version of this maxim quite unlike that contended for; and it may be observed of these maxims which have come down to us in the original text, that they do not bear a literal translation. Usage has given to nearly all of them a version of its own. Even if it were law, therefore, the maxim cited does not bear the construction nor the application

---

Opinion of the court.

---

sought to be given it. *Greenleaf v. Birth* is valuable in several other respects in this connection, and is referred to accordingly.

Take another view of the case at bar. Suppose this action instituted against Van Vocter. Do the plaintiffs stand in any better attitude than in such case? The present defendants did not enter the premises in question under and by virtue of the conveyance from plaintiffs, but under that from Van Vocter. Is there any privity between the parties to this suit? If, taken by itself, there is in the language of the exception in this case, an implication of title in the plaintiffs; is not this implication wholly destroyed by the development of the facts? Upon a full and careful examination and consideration of the interesting proposition of counsel, we are compelled to answer this question in the affirmative.

The general rule that the plaintiff in ejectment must recover upon the strength of his own title, and not on the weakness of that of his adversary, is well understood. When the title of the plaintiff is controverted under the general issue, he must show that he had the legal estate in the disputed lands, together with the right of entry. The requisite proof varies, of course, according to whether or not a privity exists between the parties. In the one case the plaintiff must show the existence and termination of the privity; in the other he must establish a clear and substantial possessory title; and the general rule that the plaintiff must recover on the strength of his own title, and not on the weakness of that of his adversary, say the authorities, "is firmly established." 2 *Bouvier's Institutes*, § 3674. These are safe rules.

And a somewhat close adherence to the ancient landmarks, as understood and explained herein, are deemed essential to the rights of parties, as well as to the due administration of justice.

We are of the opinion that the result reached in the court below upon the facts, was correct, and therefore affirm the judgment.



---

Statement of the case.

---

## W. H. GARLAND v. EMILY NORMAN.

## 1. GUARDIAN AND WARD—FINAL SETTLEMENT—RATE OF INTEREST.—

The guardian must account for interest, where he has consented to take the ward's money as borrower; where he has loaned it out with the sanction of the probate court, or without its permission, or has used it in his own business, or has in any way made profit out of it. So, where he has failed to account for the profits and income of the estate, and thereby prevented a profitable investment of such income. Where funds come to the hands of the guardian after the ward had attained her majority, his powers as statutory guardian had ceased, and the principle as to interest would not apply. But where the guardian files his final account as guardian, according to the statute, and, in such account, includes the funds so collected, then the rule relative to interest must obtain as to such funds.

2. SAME—SAME.—He cannot be permitted to claim that he can account, on this settlement, for the principal, and settle the interest, if liable, in another form. It was in his hands as a trust fund, and the rule applicable to trustees is, if they neglect for a long time to settle their accounts, or to pay over money when they ought to do so, they are liable for the legal rate of interest.

APPEAL from the Chancery Court of Pike County. Hon. E. G. PEYTON, Jr., Chancellor.

At the January term, A. D. 1874, of the chancery court of Pike county, W. H. Garland filed his final account with Emily Norman, of whom he had been appointed guardian by the probate court of Pike county.

Exceptions were filed; and, on the trial of said exceptions, the following agreed state of facts was submitted to the chancellor, to wit: That said Emily Norman was born in the year A. D. 1841, and, in 1859, chose W. H. Garland her guardian, who was duly appointed and qualified as such guardian in that year, and in the same year applied for and obtained a decree of sale of ward's lands, and sold same, on a credit of twelve months, for fifteen hundred dollars, and received the money thereon in the year 1867. Whereupon the court sustained said exceptions, and

---

Brief for appellant.

---

referred same with account to the clerk of the court to restate account, with instructions to charge said Garland with interest at the rate of six per cent. on the sum of \$1,500 from the time it was received up to the date of each payment, deducting same, and the credits in his account; and when the same was corrected and reported the sum of \$703.74 due after deducting credits, the court decreed, on motion of counsel for Emily Norman, that the account as restated be ratified and confirmed, and rendered a decree thereon for the payment of said sum of \$703.74 by said Garland in favor of said Emily Norman, and, unless paid in thirty days, execution issue thereon; to which decree of the chancellor, sustaining said exceptions to said final account, and the said final decree thereon, Garland, appellant, at the time excepted, and filed his exceptions embodying the above facts.

The case comes here by appeal from said final decree.

*Cassidy & Stockdale*, for appellant:

1. The only question presented by appellant is, as to the authority of the chancery court to charge Garland with interest under the facts in the case.

(1.) Garland was not liable to pay interest, *even if he had received the money during the existence of his guardianship.*

It is now well settled in this court, that a guardian cannot be charged interest, even on the balance reported by him on his annual accounts, unless, 1st, he agrees to take it at interest, with the approbation of the court; or, 2d, he has been directed by the court to put it out at interest; or, 3d, has employed it in his own business; or, 4th, loaned it to others; or, 5th, has otherwise made profit by it. There was no proof before the court showing either of those five grounds for charging him with interest to exist. Garland was not *prima facie* liable for interest, and the onus was on the exceptor to show his liability, and that was not shown, and does not appear in the record.

This liability upon the proof of either of the above facts, arises from the fact that the guardian is using the money of one labor-

---

Brief for appellee.

---

ing under the disability of minority, and the court thus protects the interest of the ward while he is a ward, as a special favorite of the court.

2. The chancery court, in the exercise of the jurisdiction of a court of probate, cannot exercise the remedial power appertaining to its equity jurisdiction. The principle is settled law in this state, and but one case need be cited — *Troup v. Rice*, 49 Miss., 251.

The *powers* and *duties* of a guardian terminate when the ward attains majority, and it only remains to adjust his accounts as guardian, and, but for the statute, they would stand in the relation of creditor and debtor. The power of the probate court to charge interest is confined to guardians. But, when Garland received this money, he was not guardian. The ward had ceased to be a ward, and the court had no power over him as guardian.

The court of equity might, in the exercise of its power, reach him as a trustee.

It may be said, if a balance had been adjudged in 1867, on his final account, it would have drawn interest. But that arises from the statute, which authorized judgments and decrees to draw interest, and not by virtue of the power of the probate court to charge interest to persons other than guardians.

*Harris & George*, for appellee:

Emily Norman, the appellee, arrived at age in the year 1832, and the powers and duties of Garland, her guardian, ceased at that time. See Code of 1857, page 462. The appellant received \$1,500 for her, long after his powers ceased as guardian, and he should now be held as trustee for her, and to a strict accountability.

Having voluntarily submitted himself to the jurisdiction of the court, it is but right that the court should retain the case until full justice is done in the premises. He sold her property while he was her legal guardian, collected the proceeds of the sale some five years after his powers ceased as guardian, and retained the whole

---

Brief for appellee.

---

amount for 15 months, and then pays \$150, again retains for 27 months and pays \$250, and retains the balance for 4 years and 5 months, and pays \$700, making in all \$1,100 of the \$1,500.

After he ceased to be guardian, the court had jurisdiction over him to compel him to render his account, but the court could no longer govern him as to the fund in his hands, except in the final account to decree payment or delivery. As a trustee for the guardian's ward, the case presents misapplication or conversion of the fund. In the court, he brought forward the whole matter in order to be discharged, and the court might fairly treat the case as one outside of the general rule as to funds in the hands of acting guardians.

It is plain that interest was demandable; for his failure to pay over the money was a breach of trust, as his ward was of age. The guardian, whilst the ward is under age, cannot pay over the money, and must therefore look to the court for directions. Here the guardianship had terminated. As a trustee, the rule requires him to pay the legal rate of interest, at least. See, on the subject of trustees retaining funds contrary to duty: *Perry on Trusts*, p. 428, § 468.

But is he not bound to pay interest as on loaned money? It devolves on him to show that he did not realize more than the regular rate of interest on loaned money, and this is insisted on in the cross appeal.

It is certainly unreasonable to hold that a trustee may retain against the law which requires him to pay over this money to his ward on his arrival at age, and rule the ward down to 6 per cent. interest. It is like the case of refusal to invest when investment is ordered. This is not the case of misconduct merely in management. It is a default made for the trustee's private advantage. There was no report made to the court of the balances of money. There could be no action of the court in regard to it, and the rule in *Johnson v. Miller*, 33 Miss., 553, and *Reynolds v. Walker*, 29

---

Opinion of the court.

---

Miss., 250. The relations of guardian to the court were severed by the ward's arrival at majority.

It was, however, in the power of the court, in fixing the amount due, to decree interest on the general principles of just dealing. The statute as to interest was not designed to apply to such a case.

The rule laid down by this court in *Powell v. Cooper*, 42 Miss., 221, should govern this case. It was the duty of the court to charge the highest rate of interest.

SIMRALL, J., delivered the opinion of the court.

Garland complains of the decree of the chancery court, because he was charged interest on the funds of his ward, at six per cent from the time the money was received by him.

Emily Norman, on her cross appeal, alleges that she is prejudiced by the decree, because it does not charge Garland with a high enough rate of interest.

In 1859 Emily Norman being then eighteen years of age, selected Garland for her guardian, who was duly appointed and qualified. In the same year Garland, under the order of the probate court, sold the real estate of his ward on a credit of twelve months for \$1,500. The money was collected by Garland in 1867.

The chancery court, by decretal order, directed the account to be settled on the basis of charging Garland interest at six per cent. up to each payment, a credit, then deduct such credit, etc. The final decree was made accordingly.

Both parties are dissatisfied with the decree and have appealed.

Prior to the decision of *Reynolds v. Walker*, 29 Miss. Rep., 262, there had been conflict in the cases as to the circumstances under which a guardian was chargeable with interest. In that cause the authorities were reviewed, and the court returned to the doctrine laid down in *Hendricks v. Huddleston*, 5 S. & M., 422, and *Austin v. Dean*, 23 Miss., 189, and announced these principles: The guardian must account for interest, where he has

---

Opinion of the court.

---

consented to take the ward's money as a borrower, where he has loaned it out with the sanction of the probate court or without its permission, or has used it in his own business, or has in any way made profit out of it. So where he has failed to account for the profits and income of the estate, and thereby prevented a profitable investment of such income. These principles were reaffirmed in *Roach v. Jelks*, 40 Miss. Rep., 756, and *Crump v. Gerock*, ib., 768, and *Coffin v. Bramlitt*, 42 Miss., 208.

But the ward had obtained her majority several years before Garland collected the fund. The powers and duties of a guardian terminate and cease when the ward attains majority, and he shall forthwith deliver all property to the ward, and shall also make a final settlement with his ward. Code, 1857, art. 148, p. 462.

When the money was received by Garland in 1867, his powers and duties as statutory guardian had ceased; the principles, therefore, which apply in reference to interest upon funds in his hands, whilst his powers as guardian were in existence, do not apply in this case.

He, however, filed, as required by the statute, his final settlement, and included in it the fund in controversy, deducting from it sundry credits and payments made for Emily Norman. He voluntarily submitted to the court the adjustment of a proper balance on account of this money. If he accounts for it at all in this proceeding and in the chancery court, it must be according to those rules which apply to the accounting. He cannot be permitted to claim that he can account on this settlement for the principal, but if he is liable for interest, that must be determined in another forum. He ought to have paid over this money so soon as he received it. It was in his hands a trust fund. The rule applicable to trustees is, if they neglect for a long time to settle their accounts or to pay over money when they ought to do so, they are liable for the legal rate of interest. *Perry on Trusts*, § 468, and cases in note 2.

## Statement of the case.

We think that justice has been done by the chancellor, and affirm his decree.

## N. O., J. &amp; G. N. R. R. Co. v. JAMES D. WALLACE.

1. **CIRCUIT COURT — JURISDICTION — CORPORATIONS.**—Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation, and cannot migrate to another state. But they are liable to be sued like natural persons, in transitory actions, arising *ex contractu* or *ex delicto* in any state, where legal service of process can be had. Where the defendants in the court below appeared and pleaded to the action, they cannot object to the jurisdiction, and it is too late after the plea of the general issue, to raise the question of the authority of the court finally to dispose of the case.
2. **PRACTICE — PLEADINGS — NOTICE.**—Where an improper notice is attached to a plea of the general issue, the mode of avoiding the special matter proposed to be proved under it is, not by demurrer, but by an objection to the introduction of the testimony. *Wren v. Hoffman*, 41 Miss., 616.
3. **SAME — INSTRUCTIONS — RULE OF LAW.**—As corporations can only act in conformity with the law of the state by which they are created, such corporations are responsible as carriers only to the extent, and in conformity to the law of the state, where the contract is made or the duty undertaken, and it will make no difference whether the action is in form *ex contractu* or *ex delicto*. This is in conformity to the general rule of law upon the subject of contracts and torts, and where railroad corporations are sued out of the jurisdiction by which they were created, and under whose laws alone they can act, the extent and degree of their responsibility must be determined by the law of the place of the existence and action of such corporation.

ERROR to the circuit court of Lawrence county. Hon. URIAH MILLSAPS, Judge.

This was an action brought by defendant in error, against the plaintiffs in error, in the circuit court of Lawrence county, at the May term, 1869, thereof, to recover damages for an injury alleged to have been sustained by him, resulting from a collision of trains

---

Brief for defendant.

---

of cars belonging to the plaintiff in error, on the 27th day of February, 1862, near Pontchitoula, in the state of Louisiana.

The declaration charges gross negligence, carelessness and misconduct on the part of plaintiff's agents and employees. Defendant below demurred, for want of jurisdiction. The court overruled the demurrer, and granted leave to plead. Defendant pleaded the general issue, and gave notice of special matter intended to be introduced on the trial. The plaintiff demurred to the notice. The record shows no disposition made of this demurrer. The case went to the jury, who found for the plaintiff, and assessed his damages at twelve thousand five hundred dollars (\$12,500). A motion was made for a new trial, which was overruled by the court, and the cause comes to this court upon a writ of error.

*Harris & George*, for plaintiff in error.

*Bentonville Taylor*, for defendant in error.

1. Both parties regarded the railroad company as a domestic corporation, and a citizen of this state. The court will presume it was a domestic corporation, in the absence of allegations to the contrary, as every presumption is to be indulged in favor of the jurisdiction of the court. If any exception to the writ existed, it was waived by the plea or demurrer. The demurrer only for want of jurisdiction of the *subject matter*, is an admission of jurisdiction over the *person of defendant*.

2. The act of 1852, Code of 1857, act of 1860 and act of December 7, 1863, each give our courts jurisdiction of all actions against railroad companies by service of process on any agent of the company whether domestic or foreign. Our statutes treat all suits against railroads as transitory, and in effect provides that our courts may adjudicate all "matters of controversy arising within this state," growing out of any cause of action by or against the railroad companies without regard to where these causes of action accrued.

3. The evidence establishes and fixes the liability upon the R.



---

Brief for defendant.

---

R. Co. to pay the damages sustained. It is contended that the trains were taken possession of and run by the Confederate States government; but on this point the testimony on the part of the defendant in the court below, is emphatically contradicted; and even if it were true, it is affirmative matter that should have been specially pleaded, and such defense is waived by a failure to plead it.

4. The next point made is, that they were required to run the train out of schedule time. To this we answer that the "order" was but a "request" that they should run the train in accordance with the terms of their contract with the confederate government, whenever, and at such times, without regard to the *regular* schedule time, as the exigencies of the service might require, and this is *clearly implied* from the *objects* of the contract, but they did not start the train until they were ready. The superintendent, by telegraph, cleared the track of other trains, and the regiment waited for this preparation, and he told Col. Goode that the track was clear, and then the superintendent gave orders to start.

5. That the damages were excessive, we deny. This is a question for the jury exclusively, and it is proper to consider that the injury was inflicted in February, 1862, and the damages were assessed in April, 1874, over twelve years after the cause of action accrued. The judgment for \$12,500, in 1874, is only equal to \$5,000 in 1862, at 10 per cent. per annum. This rule was applied to actions of trover. *Hinds v. Terry*, W., 80; *Texada v. Camp*, W., 150; *Fulton v. Woodman*, 40 Miss., 593. Where the property has some *pecuniary* value to the plaintiff, and is withheld wilfully from the rightful owner, or he is wilfully deprived of it, in these cases, it is the *peculiar* province of the jury to find such additional damages as in *their* judgment is right. *Whitfield v. Whitfield*, 40 Miss., 352; 44 Miss., 254. A railroad is liable for exemplary damages, if it appears that its agents acted either with gross negligence or wanton and wilful mischief, destroys the property of another depasturing on its track. *V. & J. R. R. Co. v. Pat-*

---

Opinion of the court.

---

ton, 2 George, 156. The jury may find exemplary damages. Southern R. R. Co. v. Kendrick, 40 Miss., 374; M. & C. R. R. Co. v. Whitfield, 44 Miss., 466. The principal in such case is responsible for the acts of his agent. N. O., J. & G. N. R. R. v. Bailey, 40 Miss., 395; V. & J. R. R. v. Patton, 2 George, 156; N. O., J. & G. N. R. R. v. Albritton, 9 George, 242; *ib.* v. Hurst, 7 George, 660.

PEYTON, C. J., delivered the opinion of the court.

This was a suit brought in the circuit court of Lawrence county, by the defendant in error against the plaintiffs in error, to recover damages for an injury alleged to have been sustained by him, resulting from a collision of trains of cars belonging to the plaintiffs, on the 27th day of February, 1862, near Pontchitoula, in the state of Louisiana, which is alleged to have been caused by the gross negligence, careless and misconduct of the agents and servants of the said plaintiffs.

The defendants below demurred to this action, for the want of jurisdiction in the court to entertain the suit, as the declaration shows that the injuries complained of were committed in another state. This demurrer was overruled, and leave was granted to the defendants to plead over to the plaintiff's declaration. Whereupon the defendants pleaded a plea, intended for the general issue, denying all and singular the allegations in the plaintiff's declaration. And gave notice under this plea that they would give on the trial special matter in evidence. To this the plaintiff demurred, but of which demurrer the record shows no disposition by the court. The defendants' second plea sets up by way of defense, the special matter of which notice had been given under the first plea, and a demurrer was sustained to this second plea, and leave was granted to plead over.

In this state of the pleadings the case was submitted to a jury, who found a verdict for the plaintiff, and assessed his damages at twelve thousand five hundred dollars. Whereupon the defend-

---

Opinion of the court.

---

ants moved for a new trial on the following grounds: 1. Because the verdict is contrary to the law and the evidence. 2. Because the court erred in giving the instructions asked for on the part of the plaintiff. 3. Because the court erred in refusing two of the instructions asked for on the part of the defendants. 4. Because the verdict of the jury is excessive. This motion was overruled by the court, and judgment rendered on the verdict. And from that judgment this writ of error is prosecuted on the part of the defendants below, who make the following assignments of error:

1. The court below erred in overruling the demurrer to the declaration, and in sustaining the demurrer to the defendants' pleas.
2. The court below erred in giving the instructions for the plaintiff, and in overruling the instructions asked by the defendants.
3. The court below erred in overruling the defendants' motion for a new trial.

The first assignment of error is not well taken. The court had jurisdiction of the subject matter of the suit, and as there is no objection to the service of process by which the plaintiffs in error are brought into court to answer to the action of the defendant in error, the court had jurisdiction of the plaintiffs in error, and upon well settled principles, the court having jurisdiction of the subject matter of the suit and of the defendants, can entertain the suit and try the cause.

Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation and cannot migrate to another state. But they are liable to be sued like natural persons in transitory actions, arising *ex contractu* or *ex delicto*, in any state, where legal service of process can be had. And upon a thorough examination of the law upon this subject, we have not been able to find much ground to doubt whether a private corporation of another state could be held to answer to an action in our courts. We can see no very good reason why artificial persons should not be liable to suit in the courts of another state, as well as natural persons. *Day v. Essex Co. Bank*, 13 Vt., 101;

---

Opinion of the court.

---

Argel and Ames on Corporations, 428, and 14 La., 415. In transitory actions, foreign private corporations, like natural persons, may be sued anywhere where the court can obtain jurisdiction of the corporation either by legal service of process or its appearance by attorney.

In the case under consideration, the defendants in the court below having appeared and plead to the action, they cannot object to the jurisdiction. In the case of *Cook v. the Champlain Transportation Company*, 1 Denio, 98, the court say: "It is urged on the argument, that the defendants being a foreign corporation, were not amenable to the laws of this state, nor subject to the jurisdiction of its courts.

Such corporations are legal persons, and are by no means strangers in our courts. They may sue, as is often done, and by appearing and pleading in chief, to an action brought against them, jurisdiction over the parties who defend, as in other cases, is conceded. We need not stop to inquire whether an appearance could be compelled, for here, as far as we know, it was voluntary. The general issue was pleaded, and the cause has been tried. As this court has an undoubted jurisdiction over the subject matter of the action, it is now quite too late to raise the question of its authority finally to dispose of the case. The demurrer to the declaration was therefore properly overruled. And the demurrer to the notice attached to the general issue was not the proper mode of taking the objection to the matter proposed to be given in evidence under the plea. When an improper notice is attached to the general issue, the mode of avoiding the special matter proposed to be proved under it is not by demurrer, but by an objection to the introduction of the testimony. *Wren v. Hoffman*, 41 Miss., 616. This demurrer ought therefore to have been stricken out. But the demurrer to the second plea was properly sustained as it contained the same matter specified in the notice attached to the first plea.

The second assignment of error impeaches the correctness of the instructions given for the plaintiff. We can see no objection to the second instruction.

---

Opinion of the court.

---

The first instruction is as follows: "The court instructs the jury that under the law of this state, every railroad company shall be liable for all damages which may be sustained by any person in consequence of the neglect or mismanagement of any of their agents, conductors, engineers or clerks, or the management of their engines." This instruction has reference to our own laws, and not to those of Louisiana, in which the injury complained of in this action occurred.

As corporations can only act in conformity with the law of the state by which they are created, it must follow by parity of reason, that such corporations are responsible, as carriers, only to the extent and in conformity to the law of the state where the contract is made or the duty undertaken. And it will make no difference whether the action is in form *ex contractu* or *ex delicto*. This is in conformity to the general rule of law upon the subject of contracts and torts. So that where railroad corporations are sued out of the jurisdiction by which they were created, and under whose laws alone they can act, the extent and degree of their responsibility must be determined by the law of the place of the existence and action of such corporation.

And it has been held that where a collision between American vessels occurred in a British port, the rights of the parties depend upon the British statutes or laws there in force, and if doubts exist as to their true construction, our courts will adopt that which is sanctioned by the courts of Great Britain. *Smith v. Condry*, 1 How., U. S., 28; *Redfield*, 339, secs. 471, 473 and 476. If the rights of the parties in this litigation depend upon the laws of the state of Louisiana, where the collision occurred, it follows that the instruction is inapplicable to the facts of the case, and is therefore erroneous. 2 *Redfield on Railways*, 313. The record shows that all the instructions asked by the defendants below were given.

The refusal of the court to grant a new trial is made the subject of the third and last assignment of error. And one of the grounds assigned in the motion for a new trial is that the court erred in

---

Statement of the case.

---

giving the instructions asked by the plaintiff. We have seen that the first instruction given to the jury on part of plaintiff did not propound the law applicable to the facts of the case, and for that reason the court below erred in overruling the defendant's motion for a new trial.

The judgment must be reversed, the cause remanded, and a *venire de novo* awarded.

---

## ROBERT and H. V. PULLIAM v. A. H. TAYLOR.

60	251
74	503
074	510

1. ACCORD AND SATISFACTION. — If the creditor compounds with the debtor, and agrees to take less than the whole debt, and accepts the bond or promissory note of his creditor with security, or the note of a third person; here the new and additional security makes the consideration for a relinquishment of the excess, and the accord and satisfaction are complete.
2. SAME — CASE IN JUDGMENT. — Where P. was indebted to T. in the sum of \$3,400, and it was agreed that in satisfaction of the debt, P. should execute his notes for \$1,500, to be paid in three annual installments of \$500 each, which should be secured by mortgage, the notes and mortgage were executed, P. paid one of the notes, T. brought suit on the original debt, disregarding the agreement, *held*, that the mortgage as security was a sufficient consideration to uphold the agreement, and that the accord and satisfaction were complete.

ERROR to the Circuit Court of Chickasaw County. Hon. W. D. BRADFORD, Judge.

Taylor brought an action of debt in the circuit court of Chickasaw county against Robert and H. V. Pulliam, on a promissory note for \$3,400, dated November 20, 1869, due at one day and bearing interest at ten per cent. per annum. The defendants interposed this plea in bar of the recovery sought. After the making of the promissory note mentioned, to wit: In January, 1866, and before the commencement of this suit, the defendants executed and delivered to the plaintiff, who then and there received and ac-

---

Brief for plaintiff.

---

cepted from defendants, their three several promissory notes, in writing of the value of fifteen hundred dollars, all dated January 10, 1867, each for the sum of five hundred dollars, and all payable to A. H. Taylor, or *bearer*, the first falling due January 10, 1868, the second, January 10, 1869, and the third, January 10, 1870, secured by a deed of trust, signed and sealed by said defendants, to one U. S. Williams, trustee, with power to sell certain lands of said defendants situated in said county, and delivered with the notes to plaintiff in full satisfaction and discharge of the promises in the declaration mentioned, and of all the damages sustained by reason of the nonperformance thereof. One of said notes has been paid, and the defendants have always been ready and willing to pay the other two notes according to their tenor and effect to the rightful holder and owner thereof. The plaintiff in the court below demurred to this plea because, as it is said, the facts alleged are no defense to the action, because there is no sufficient consideration averred, and because it is not alleged that the notes ever were assigned, and the defendants do not tender, with their plea, the amount of the notes remaining unpaid. The demurrer was sustained, and that ruling of the court is here assigned for error.

*W. L. Nugent*, for plaintiff in error:

The plea of accord and satisfaction, or of a composition of the original promise is the subject matter of controversy. Is it good? Ordinarily an agreement to pay and accept, or even the payment and acceptance of a less sum than is due in satisfaction of a debt is not a good accord and satisfaction. But this rule proceeds solely upon the hypothesis that the creditor receives no benefit from the transaction. If, however, the plaintiff received something valuable, or something collateral to the new promise showing the *possibility of benefit* to him, then the accord and satisfaction is good. *Keeler v. Neal*, 2 Watts, 424; *Harrison v. Close*, 2 John., 418; *Latapee v. Pecholier*, 2 Wash., C. C., 180; *Musgrove v. Gibbs*, 1 Dall., 217; *Howe v. MacKay*, 5 Pick., 44; *Makepeace v. Harvard College*, 10 Pick., 304; *Wil-*

---

Brief for plaintiff.

---

liams v. Stanton, 1 Root, 426; Blinn v. Chester, 5 Day, 360. So also the giving of further security for part of a debt and acceptance of it in full of all demands, though it be for a less sum than the debt, makes a valid accord and satisfaction. Boyd v. Hitchcock, 20 John., 76; Le Page v. McRae, 1 Wend., 164; Kellogg v. Richards, 14 Wend., 116; Keeler v. Salisbury, 33 N. Y., 648.

In Jones et al. v. Perkins et al., 29 Miss., 142, the court say: "The rule (that an agreement to accept a less sum than the amount due is no defense to the debtor), is entirely technical, and not very well supported by reasons." \* \* \* If such payment is made, or to be made at a place different from that appointed by the contract, this is a sufficient consideration." The debt in that case exceeded \$2,000 payable at Jackson, Mississippi, and the contract was to pay \$1,500 at New York, in full payment and discharge of it. The accord and satisfaction were, therefore, held good. And this but agrees with the current of authority when they place as a test the benefit or possibility of benefit to the relinquishing party.

In this case, the debtor gave new notes payable to *bearer*, and secured by a deed of trust. So that, in point of fact, to permit a recovery on the original contract would work a great wrong upon him, whether he was ever held liable on the outstanding new notes or note. Nor can I well see how it could be held that the acceptance of the *collateral* security did not estop any suit upon the original note. It was certainly contemplated by the parties that, upon default, the security provided was to be resorted to by the creditor. There is very little doubt of the proposition that the commercial character conferred upon the notes payable to *bearer* takes them out of the operation of our statute, and renders the maker liable to pay them in the hands of an innocent holder without notice. Clearly the plea was good, and the plaintiff in error should have been compelled to reply and tender the trust deed and new notes for cancellation, for it cannot be contended that these instruments, obtained in the manner indicated, can be used



---

Brief for defendant.

---

for any other purpose. The creditor cannot affirm and disaffirm the contract of compromise. It is either good or it is not good. If good, the plea was a complete bar to the action; if bad, fair dealing and common honesty required the surrender of the notes and deed, and the placing *upon the record in the case*, the debtor in *statu quo*. It is not right that the *creditor* should recover upon the idea that the compromise, being unsupported by any consideration, was void, and leave the *debtor* to the hazards of future litigation to protect himself against the consequences of a supposed imprudent act. Such a procedure would be contrary to the maxims of the law, and destitute of right.

A. Y. Harper, on the same side.

Houston & Reynolds, for defendant in error.

The errors assigned are, that the court erred in sustaining the demurrer to the 2d, 3d and 4th pleas.

I. The second plea sets up usury. It avers that the note was given for usurious interest, and is pleaded in bar of the *entire action*. It does not state how much interest in excess of the legal rate was included in the note.

At common law, usury avoids the entire contract; under our statute it is a defense only for the excess of interest charged above the legal rate. Hence, under our statute, a plea of usury should not and cannot be in bar of the entire action. The plaintiffs should be allowed, if there be no other defense than that of usury, to take judgment by default for the principal, and the issue tried as to the interest, or he may confess the plea, and take judgment for the principal and interest. *McLaurin v. Parker*, 24 Miss., 509-12.

Defendants gave notice, with their plea of the general issue, that they would rely upon the defense of usury. This waived any error committed by the court in sustaining the demurrer to the second plea. We will discuss this under our third general head.

On the trial, there was no testimony to sustain the plea of

---

Brief for defendant.

---

usury. There was no instruction asked or given in reference to this defense.

II. The third and fourth pleas present substantially the same defense — a pretended accord and satisfaction. The accord set up is, an agreement to accept three notes of defendants, secured by trust deed upon their property, of five hundred dollars each; the satisfaction, the delivery of these notes and their payment, and in the 4th plea, a readiness to pay.

The amount of the three notes for \$500 each is a less sum than that sued for. An agreement to accept a less sum, or the actual acceptance of a less sum, than the amount due, is not an extinguishment of the demand. *Fitch v. Sutton*, 5 East., 230; *Boyd v. Hitchcock*, 20 John., 76.

"A promise to pay a smaller sum than that which is due, to extinguish an existing debt, does not operate as an extinguishment of the same, where the promise is reinforced by additional security from the debtor's own means," as by a mortgage or deed of trust upon his real estate. *Keeler v. Saulsbury*, 33 N. Y. (6 Tif.), 648, 653.

III. Defendants, under their plea of the general issue, gave notice that they would offer in evidence certain special facts in bar and avoidance of the action. The special facts included in this notice are the same as those set forth in their second, third and fourth pleas. Under the notice, defendants had the right to introduce every legal defense which they could have done under their special pleas. Erroneous decisions on the pleadings are no grounds for reversal, where the defendant could make the same defense under another plea. *George's Digest*, 371, sec. 36; 3 S. & M., 647; 27 Miss., 425; 31 Miss., 606; 32 ib., 245; 33 ib., 503.

In *Montgomery v. Dillingham*, 3 S. & M., 647, it was held, where a party defendant pleads several pleas, to which demurrers are sustained, and afterwards pleads a further plea subject to demurrer, but upon which the plaintiff takes issue, that the judgment of the court, even if erroneous, was not error prejudicial to the defendant. To the same effect is *Crane v. French*, 38 Miss., 503.

---

Opinion of the court.

---

In *Conner v. Swain*, 32 Misa, 245, even if it was erroneous for the court to have sustained the demurrer to the 3d, 4th and 2d special pleas, it was not an error prejudicial to defendants, as they could have made the same defense under the general issue, with notice of the special matters which was filed, as they could under the special pleas.

IV. The first charge shows that there was testimony showing a payment of \$500 by defendants to plaintiff, and that this was applied by consent of parties to the payment of a judgment of Patrick Gwin & Co. against defendants. The court instructs the jury that if so applied it was not to be credited on the note sued upon.

The second instruction shows, that if there was any agreement of accord and satisfaction of the note sued upon, it was rescinded before consummation by mutual consent, and the amount paid by defendants in pursuance of such agreement applied to the judgment of Patrick Gwin & Co. v. Defendants, by the direction of the latter. It is manifest from the instructions asked by plaintiff that defendants attempted under their notice with the plea of the general issue to prove their defense of accord and satisfaction, and that they signally failed in that attempt. Hence, if the court erred in sustaining the demurrer to the 3d and 4th pleas, it was not an error prejudicial to defendant.

Our conclusions are, that the demurrer to the special pleas was properly sustained, but if they should have been overruled, this court will not reverse the cause for it would be an error which would not prejudice plaintiffs in error.

SIMRALL, J., delivered the opinion of the court :

This writ of error is prosecuted to review the rulings of the circuit court in sustaining a demurrer to the defendant's special pleas, setting up accord and satisfaction.

The first plea avers an agreement to make and deliver to the plaintiff three promissory notes of \$500 each, and to execute and deliver a deed in trust as security therefor, in payment and satis-

---

Opinion of the court.

---

faction of the note sued on; and that the notes and deed in trust were accordingly made and delivered to, and received by the plaintiff. To this plea the demurrer was sustained.

Thereupon, the defendants filed, under the judgment of *respondent ouster*, a fourth plea, alleging the same facts with more fullness and particularity, with the additional averment, that the defendant had paid the first due of the three notes of \$500 each, and that he was ready and willing to pay the other two according to their tenor and effect. At the same time, defendants filed a notice that they would offer to prove a series of facts, substantially the same as those stated in the plea.

To this plea the demurrer was also sustained. The case was submitted to the jury on the general issue. There was no motion made for a new trial; and we are without information as to the evidence before the jury.

It is urged, in this court, that the demurrer ought not to have been sustained to the third and fourth pleas.

Accord and satisfaction is the substitution of another agreement between the parties in satisfaction of the former one, and an execution of the latter agreement. Such is the definition of this sort of defense, usually given. But a broader application of the doctrine has been made in later times, where one promise or agreement is set up in satisfaction of another. The rule is, that an agreement or promise of the same grade will not be held to be in satisfaction of a prior one, unless it has been expressly accepted as such. As, where a new promissory note has been given in lieu of a former one, to have the effect of a satisfaction of the former, it must have been accepted on an express agreement to that effect.

But the original promise was to pay \$3,400, and the new agreement was to pay only \$1,500, in three equal installments. The general rule is, that a similar security for a smaller debt cannot be pleaded in satisfaction of a larger debt. *Heathcote v. Crookshanks*, 2 T. R., 24; *Lynn v. Bruce*, 2 H. Bl., 317. But the rule

---

Opinion of the court.

---

is not applied, except where there is a liquidated debt. If the demand is for unliquidated pecuniary damages, the acceptance of a smaller sum than that originally claimed, will be a satisfaction, and may be pleaded to the action. *Longridge v. Dorville*, 5 B. & A., 117; *Wilkinson v. Byers*, 1 A. & E., 106.

The doctrine generally accepted by the courts is, that a creditor is not bound by an agreement to accept a smaller sum in lieu of a liquidated ascertained debt of a larger amount. If, however, the latter agreement or promise is supported by some new and additional advantage to the creditor, it will serve as a consideration sufficient to support the new promise or agreement. *Steinman v. Magnus*, 2 Camp., 124; *Sibree v. Tripp*, 15 M. & W., 23.

✓ The earlier authorities lay down the rule with strictness, that an accord to avail anything must be executed. The performance too, it was said, must be strictly in conformity to the accord. It would be difficult to reconcile with this principle that class of cases which hold that a subsequent agreement or promise may be pleaded in satisfaction of a prior one, unless there has been performance of the latter. The distinction which is palpable is, that in the latter class of cases the *promise or agreement* is secured in satisfaction. But if the intendment of the parties is, that performance of the latter promise, and not the promise itself, is intended to work satisfaction, then there will be no satisfaction without performance.

The reason as given by Lord Ellenborough in *Fitch v. Sutton*, 5 East, 232, why the acceptance of a less sum in money than is actually due will not extinguish the whole debt, though received by the creditor upon that condition, is that there must be some consideration for the relinquishment of the excess beyond the amount paid; something to show the possibility of benefit to the creditor. It is well settled on authority, that if the creditor accept some other thing, as a chattel of much less value, it could be pleaded in satisfaction. There is no sound, rational distinction between the acceptance of an article of property, worth just half

---

Opinion of the court.

---

the amount of the debt, especially such commodities as cotton or iron, that have a definite market value, and the acceptance of half the amount of the debt in money. Yet all the authorities agree that the former would be a good accord and satisfaction, and the latter would not. Because this distinction has no solid foundation, and seems to be without good reason, resting at this day exclusively upon authority, the courts of late years have been astute to withdraw from its application all those cases where there was any new consideration or benefit that might inure to the creditor, although it might fall far short of the original debt. It may be difficult to yield assent to the proposition, that if the debtor pays in money, and the creditor takes in payment and discharge of his debt one half, it is no satisfaction; yet he may take the bond or promissory note of his debtor with surety, or the note of a third person for half of the amount due, and that will be a good discharge and satisfaction. *Boyd v. Hitchcock*, 20 John., 76, was the case of receiving the debtor's note with the name of another person as surety, for less than was due, was held to be a valid accord and satisfaction. In *Kellogg v. Richards*, 14 Wend., 116, the creditor took the note of a third person for a less sum, which was a good accord and satisfaction. If the payment of a less sum in money is made before the debt is due, that is a satisfaction, because it might be more beneficial than the whole sum on the day. *Pinnell's case*, 5 Co., 117.

The rule supported by authority is this. If the creditor compounds with the debtor, and agrees to take less than the whole debt, and accepts the bond or promissory note of his debtor with security, or the note of a third person, here the new and additional security makes a consideration for a relinquishment of the excess, and the accord and satisfaction are complete. *Brooks v. White*, 2 Met., Mass., 285, 6, 7; *Boyd & Suydam*, 20 John., 76; *Booth v. Smith*, 3 Wend., 66; *Harper v. Graham*, 20 Ohio Rep., 114. These and other cases that might be referred to hold the doctrine, that if the debtor offers *additional* security, on the terms

---

Opinion of the court.

---

that the creditor shall give up a portion of his debt and the creditor consents, and actually accepts the new security, for less than the whole debt, it does constitute a valid accord and satisfaction. The requisites of the common law, to make a valid contract are met. The *security* is a sufficient consideration to support the agreement. And since the parties are the judges of the value of the consideration, no good reason can be assigned why the courts should not recognize such a contract.

In the exigencies of business, it may be a very prudent arrangement, for a creditor to *secure* part of his debt when the whole is in danger of loss.

The pleas (in their substance) bring the defense within the rule we have been discussing. The agreement was that the defendants should make the three promisory notes of \$500 each secured by deed of trust, which the plaintiff accepted in discharge of his larger debt. The 3d plea sets up the accord to have been that the notes and deed of trust were to be made, and the creditor agreed to accept them in satisfaction of the debt sued on — that they were so executed and received by the plaintiff. The notes and the security, were accepted in satisfaction so that the plaintiff would look to them alone, and not to the original debt. The performance contemplated by the plea was the making and delivery to the plaintiff of the notes and security.

We are of opinion that the demurrer to the 3d and 4th pleas ought to have been overruled. The counsel for the defendant in error, insists, that although it may have been erroneous to adjudge the pleas bad, yet the defendants under the notice might have proved the same facts to the jury. We can not, in the absence of information communicated by the record, suppose that the circuit court would have allowed testimony to go to the jury to establish a defense which it had twice adjudged to be bad. No question has been made in this court arising on the pleas as to their technical fullness. We have confined ourselves to their substantial merits. We think the pleas substantially good.

---

Brief for plaintiff.

---

The judgment of the circuit court is reversed, and judgment rendered in this court, overruling the demurrer to the third and fourth pleas, and cause remanded for further proceedings.

---

A. L. DANIEL v. MARY PURVIS, next friend, etc.

1. SWAMP AND OVERFLOWED LANDS — TITLE THERETO — ACT OF CONGRESS, 28th SEPTEMBER, 1850.— This act of congress, which made a grant of all swamp and overflowed land within the state to the state, vested at once the title to all such lands in the state. The vesting of the title in the state is not dependent upon a designation of the lands by the secretary of the interior. If the state or its vendee can show that certain lands were swamp and overflowed lands, that establishes the title under the grant. *Fore v. Williams*, 35 Miss., 536; *Railroad Co. v. Smith*, 9 Wall., 99.
2. SAME — CASE IN JUDGMENT.— It is admitted that the tract in controversy is swamp and overflowed lands, and in the list of swamp lands located by the state and filed in the office of the secretary of state on the 6th of Dec., 1856, and submitted to the secretary of the interior 11th of Nov., 1856, and approved 18th of Nov., 1856. That the entry of Purvis, through whom the plaintiff in ejectment claims, was made the 7th of March, 1856. *Held*, that the title of the United States passed to the state by the act of congress of Sept. 20th, 1850, and that no interest remained in the United States to vest in P., the enterer and patentee. That the approval of the plat did not vest the title, but merely designated the land.

ERROR to the Circuit Court of Smith County. Hon. URIAH MILSAPS, Judge.

The facts of the case sufficiently appear in the opinion of the court.

The error assigned is, that the judgment of the court below, upon the agreed facts, should have been for the defendant.

*J. A. P. Campbell*, for plaintiff in error, insisted:

1. That the act of congress of 28th Sept., 1850, vested in the state title to all the swamp and overflowed land in the state. That



---

Opinion of the court.

---

the subject of grant was made certain by the location, which, when approved by the secretary of the interior, had relation back to the date of the grant and defeated claims by purchase of the United States after the date of the grant and before the approval of the location. *Fore v. Williams*, 35 Miss., 533. *Railroad Co. v. Smith*, 9 Wall., 95.

2. That the act of congress of 2d March, 1855, relates wholly to then past entries, and is not prospective. Nor could an act of congress divest title vested in the state. *Rice v. Railroad Co.*, 1 Black (U. S.), 358. That the provisions of this act are a distinct recognition of the rights conferred by act of 2d Sept., 1850.

*W. H. Hardy*, for defendant in error, contended :

1. That no title to swamp and overflowed lands vested in the state until located by the commissioners appointed for that purpose, and a report of such location to and approval by the secretary of the interior. *Funston v. Metcalf*, 40 Miss., 504.

2. That under the rule laid down in *Funston v. Metcalf*, 40 Miss., 504, Daniel acquired no title from the state, because Purvis had bought from the United States before any location of swamp and overflowed lands was made, or any approval by the secretary of the interior.

SIMRALL, J. delivered the opinion of the court :

W. J. Purvis, the ancestor of the plaintiff, entered the land in dispute, at the land office at Jackson, on the 7th of March, 1856, and on the first of March, 1859, a patent was issued to him by the United States.

A. L. Daniel, the defendant, derives title by mesne conveyances from C. J. McLauran, who purchased the land from the state, and received a patent the 15th of January, 1857. The title of the state is under the act of congress of Sept. 28, 1850, which granted to the state "all the swamp and overflowed lands therein," for certain purposes. The premises sued for are included in the list and plat of such lands, approved by the secretary of the interior the 6th of Dec., 1856.

---

Opinion of the court.

---

The decision of the circuit court was in favor of the plaintiff's title, derived by purchase from the United States.

In the case of *Fore v. Williams*, 35 Miss. Rep., 536-7-8, it was held that the act of congress (above referred to) in its first section, made a grant of the overflowed and swamp lands to the state, which took immediate effect as to all such lands then unsold by the United States. The first section by its terms makes a present grant, and therefore the second section looking to the issuance of a patent to the state after the lands have been located, gives no additional value or significance, which had not already attached to the grant. A certain officer was designated to make out an accurate list and plat of the lands embraced in the grant, which thereby made specific and certain the parcels and tracts of land which passed to the state. In *Railroad Co. v. Smith*, 9 Wallace, 99, the supreme court put the same construction upon the act of congress, holding that it operated as a present grant "of the swamp and overflowed lands made thereby unfit for cultivation and not sold," and that although the secretary of the interior might long delay or neglect to perfect the lists and maps, it was open to other proof, to show that particular tracts were of the character described in the act. It was not dependent upon a designation of the lands by the secretary, whether they vested or not in the state. But if the state or its vendee could show by witnesses, that certain tracts were swamp and overflowed lands, that established the title under the grant.

The act of congress grants immediately to the state the swamp and overflowed lands, of which no disposition had before that time been made. The words in the act are "unsold."

The ground of the decision in *Funston v. Metcalf*, 40 Miss., 506-7, was that no approval of the particular parcel was ever made by the secretary, but such approval was purposely withheld, because of a prior sale by the United States.

The agreed facts in this case are, that the tract sued for was "swamp and overflowed" land and "in the list of swamp land

---

Opinion of the court.

---

located by the state and filed in the office of secretary of state, on the 6th of December, 1856, and submitted to the secretary of the interior on the 11th of November, 1856, and approved by the secretary November 13th, 1856. The entry by Purvis, through whom the plaintiff in ejectment claims, was made, 7th of March, 1856, several months before the list of swamp lands was approved by the secretary.

In *Railroad Co. v. Smith* (*supra*), the railroad company claimed under a grant, made by congress May 15, 1856, in aid of the road, which, however, was subject to the exception that it did not attach to any lands which had been previously sold or disposed of by the United States. It was held that the lands which were "swamp and overflowed," and which passed to the state by act of September 28, 1850, were excepted out of the grant to the railroad company — and as we have seen, if it could be shown by testimony, that the land was of the character named in the act — such lands passed to the state, although the secretary of the interior may not have approved a list and plat of them. In the agreed case, it is admitted that the tract sued for was "such" (that it was swamp land in the sense of the act), and further, that "it is in the list," made out and approved by the authorities.

The swamp and overflowed lands vested by virtue of the grant by congress in the state. In this case it is admitted as a fact, that the particular parcel was "swamp land." If so, then no interest remained in the United States which could be sold to Purvis, the enterer and patentee. The designation of a list and plat, approved by the secretary of the interior, was to identify the land. The title passed to the state, by virtue of the grant in the act of 1850; the list and plat served to identify the subject of the grant. See *Wray v. Doe, ex demise, etc.*, 10 S. & M., 452; *Harris v. McKissick*, 34 Miss., 469; *Minter et al. v. Shirley*, 45 Miss., 376, et seq.

In the case of *Ford v. Williams*, *supra*, the patent from the state bore date the 20th of March, 1855, and the date of the entry at United States land office, was 3d of November, 1854. The

---

Syllabus.

---

list and approval of the secretary thereto, of the swamp lands was dated 31st of January, 1855. If the title remained in the United States subject to sale, before this list and plat was made out and approved, plainly the purchaser from them would have had the better title. But as the grant has been construed, it takes effect presently, and therefore a purchaser from the state gets a title which relates back to the date of the grant by congress, and must prevail over any purchaser from the United States subsequent thereto.

On the agreed facts, the verdict ought to have been for the defendant.

Judgment reversed, and cause remanded.

---

WARREN R. DENT v. JONES & PINTARD.

1. PRACTICE—STATUTE OF LIMITATIONS.—J. & P. brought an action of assumpsit against D. for \$400, attorneys' fee. D. interposed the statute of limitations. D., with his family, left for Europe in the spring of 1870, and returned in the fall of the same year. Deducting the period of his absence, and the claim was not barred; otherwise, it was barred. He had left his home and furniture. The plaintiffs testified, that on the return of D., they demanded \$250 for their services, for which the suit is brought for \$400. These questions were presented for the consideration of the jury: 1. Should the period of D.'s absence be deducted, or could he have been legally served with summons during that period? 2. Whether, by the demand of \$250, J. & P. intended to fix the value of their services at that sum?
2. SAME—INSTRUCTIONS.—The court instructed the jury: "If the jury believe that D. had a home here, with his furniture at such home, but went abroad for his health, and remained in Ireland from April, 1870, until November, 1870, then the jury may find that such absence from Mississippi in Ireland, was an actual residence there for the time above stated; and, if they so find, they are then authorized by the law to deduct said time from the statute of limitations, and find for the plaintiffs." *Held*, that this was error. Rev. Code, 1857, 489; art. 64, Rev. Code of 1871, § 701; French v. Davis, 38 Miss., 218-25; Ingersoll v. Morse, 33 ib., 697.

---

Brief for plaintiff.

---

ERROR to the Circuit Court of Jefferson County. Hon. ABEL ALDERSON, Judge.

The facts in the case appear sufficiently in the opinion of the court.

The following are the assignments of error, to wit:

1. The court below erred in overruling the motion of the defendant below (plaintiff in error), for a new trial; whereas, it ought to have sustained said motion.

2. The verdict of the jury was against the law and the evidence, in this, that they found for the plaintiffs below (defendants in error), when they ought to have found for the defendant below.

3. The verdict of the jury was excessive.

*W. F. Mellon*, for plaintiff in error:

1. The suit was for a sum certain, claimed to be due on open account; there is no proof to sustain the demand in this view. The plaintiff, Jones himself, fully and clearly shows that there was no fixed and certain price; he sues on open account, and recovered judgment on evidence which only shows that they might have had a right of action of another kind.

2. Jones and W. R. Dent both show that Jones & Pintard first demanded \$250, not as a compromise either. Jones says he put his claim at that figure, because he was afraid, if he put it higher, the claim would be contested by Dent." "*An attorney will not be allowed, upon proof that his charge is reasonable and customary, to receive a greater sum for professional services than he has previously demanded, if the previous demand was not in the way of a compromise.*" *Ingersoll v. Morse*, 4 George, 667.

3. Under the pleading and proof, the case was clearly barred by the statute of limitations, unless the proof showed that Dent did reside out of the state for the alleged time. The statute says, "absent from and residing out of the state." Dent was out of the state, but *did he reside out of it* any part of the time of his absence? Rev. Code, 1857, 400, art. 13; Rev. Code, 1871, § 2157. All the

---

Opinion of the court.

---

circumstances and facts show that he did not reside out of the state at any time after the right of action accrued, and before suit brought. See *Alston v. Newcomer*, 42 Miss., 192.

*H. Cassidy*, for defendants in error:

The evidence shows that the usual residence of Warren R. Dent was in Jefferson county, Miss., which, with his entire family, consisting of wife and children, he left on the 28th day of May, 1870, leaving his furniture there, going abroad for the benefit of his health, and the education of his children, with his usual place of abode in Cork, Ireland, during his absence from the state, from which place he returned to Mississippi Nov. 24, 1870, being absent near seven months. But, having left with the purpose of returning in the fall, whatever of legal question there is in the case, arises on this issue, and turns mainly on the phraseology of the statute, "absent from and residing out of the state," so as to justify a deduction of the seven months he and his family were out of the state from the three years, which had otherwise elapsed from the time the cause of action accrued.

The statute allowed three entire years within which plaintiff should bring his suit, unless prevented from getting due service of process, by the act of the defendant. Mere absence from the state, in every case, would not prevent service; for, if the defendant had a fixed abode at which his family remained, service could be had by leaving a copy. And the time during which he was absent should not be deducted, unless *he could not have been served with process*.

TARBELL, J., delivered the opinion of the court:

Assumpsit by Jones & Pintard to recover of W. R. Dent, \$400, for services as attorneys. The case turns upon the issue under the statute of limitations. Dent, with his entire family, left the state for Europe in the spring of 1870, and returned to his home in the fall of that year. The question before the court and jury on the trial was, whether the time of such absence in Europe should be deducted

---

Opinion of the court.

---

from the period between the date of the accrual of the claim and the commencement of the suit for its recovery. If not deducted the claim was barred by statute, but if deducted, the right of recovery depended upon whether the case was otherwise made out, of which there seems to be not much doubt. It appeared that Dent left his house, with all his furniture therein, wholly undisturbed during his absence; and this does not appear to have been controverted on the trial. In such case, mode of service of process is prescribed by statute. Code of 1857, p. 489, art. 64; Code of 1871, § 701.

Diligence in the commencement of suits is necessary, and if process can be served, absence should not be deducted to save the bar of the statute. *French v. Davis*, 38 Miss., 218, 225. In the case at bar, service of process by posting prominently at the domicile of the defendant, was available to the plaintiffs. If so, the jury must have been misled by the first instruction, in which the right of recovery is based upon the absence of the defendant so that "a summons could not be served upon him" — doubtless, in the minds of the jurors, referring to personal service. If so, this was erroneous.

There is also an obstacle to the recovery of the amount claimed. The plaintiffs in the action testified on the trial that on the return of Dent from Europe, they demanded \$250 of him for the services for which they brought this suit, in which they claimed and recovered \$400.

According to the rule in *Ingersoll v. Morse*, 38 Miss., 667, they were entitled to recover only \$250. It ought, probably, to be submitted to the jury to say whether by the demand of \$250, the plaintiffs intended to fix the value of their services or their charge for the same, at that sum.

It is inferred, perhaps erroneously, that the foregoing points were not mooted on the trial, though clearly embraced in the motion for a new trial, which was overruled. One of the grounds of the motion for a new trial was alleged errors in the instruc-

## Syllabus.

tions for the plaintiffs. The first instruction has been noticed. In the second, the court say, "If the jury believe that Dent had a home here, with his furniture at such home, but went abroad for his health and remained so abroad in Ireland and out of the state of Mississippi from April, 1870, until November, 1870, then the jury may find that the said absence of the defendant from Mississippi in Ireland was an actual residence there for the time above stated, and if they so find, they are then authorized by the law to deduct said time from the statute of limitations, and find for the plaintiffs."

The error in this instruction is, that it wholly pretermits the doctrine of *French v. Davis*, *supra*, and the mode of service of process authorized by the Code under the facts stated in the instruction.

If it had been submitted to the jury to find as a question of fact, whether they believed Dent had a domicile here, with his furniture therein, and they had found, that they did not so believe; and, if it had been submitted to them to find whether, by the demand of \$250, the plaintiffs fixed the amount of their claim or value of their services, as in *Ingersoll v. Morse*, *supra*, and they had returned a verdict for \$400, the verdict would have precluded all further cause or chance of contention.

The general doctrine as to the distinction between domicile and residence seems to be correctly stated in the instructions. *Alston v. Newcomer & Kausler*, 42 Miss., 186.

For the causes indicated, the judgment will be reversed and the cause remanded, to enable the questions upon which this case hinges, to be distinctly submitted to and passed upon by the jury.

Judgment reversed, cause remanded and a new trial awarded.

---

 ELVIN LOGAN v. THE STATE.

1. CRIMINAL LAW—IMPARTIAL JURY—SEC. 2, ACT OF APRIL 5, 1872.—  
Among the rights secured to one charged with a criminal offense, by sec.

50	269
c72	521
50	269
86	149



## Statement of case.

7, art. 4, of the constitution is, "a speedy and public trial by an impartial jury," etc. Any act of the legislature, which should encroach upon the qualifications of jurors, in such wise, as to endanger their impartiality, would be an infringement of this constitutional privilege. *Quære.* Is sec. 2 of the act of April 5, 1872, constitutional?

2. SAME — SAME — EXTENT THEREOF. — The extent of the privilege is, that each member of the panel shall be indifferent and impartial; in that state of mind, unbiassed by a pre-opinion or prejudice, which would or might interfere with the just influence of the testimony on the mind.
3. SAME — SAME — RULE IN THIS STATE. — The rule in this state is, that if the mind of the juror is so far prejudiced as to require testimony to annul pre-opinion derived from any source or origin; or if the opinion has been engendered from personal knowledge, from hearing the witnesses, on a former trial, although the juror may disclaim that it would influence his verdict and claim that he was unbiassed, he would be an incompetent juror. But if the opinion is formed from rumor, and upon investigation, shall be shown not to be fixed so as to create a bias or prejudice which would require testimony to remove, such person is a competent juror.
4. IMPANELING A GRAND JURY — SPECIAL VENIRE — WAIVER THEREOF. — After a grand jury has been sworn and impaneled, exceptions cannot be taken to an individual member thereof. Code of 1871, § 729. When a party goes to trial, without service of the special venire, he will be taken to have waived it. *Head v. The State*, 44 Miss., 749; *Durrah v. The State*, ib., 795.

ERROR to the Circuit Court of Rankin County. Hon. W. M. HANCOCK, Judge.

The plaintiff in error was indicted for the murder of one Henry Young. On the first trial was convicted, and a new trial granted. The second trial was had in the October term of the circuit court of Rankin county; upon this trial prisoner was also convicted and sued out a writ of error to this court. The only point discussed in the opinion of the court was as to the qualification of one Maxey as a juror. This juror, upon his *voir dire*, was asked by the district attorney, "if he had formed or expressed any opinion as to the guilt or innocence of the prisoner." He answered, "that he had." Said juror was then asked, "if that opinion had been formed from hearing the evidence, talking to the witnesses, or

---

Statement of case.

---

from common rumor." He answered, "by talking with the witnesses." The district attorney further asked, "whether his mind was so made up and prejudiced one way or the other, as to render him unable to decide the case according to the evidence adduced on the trial." He answered, "that he thought his mind would be governed by the evidence." Juror was further asked, "whether his mind was as free to act and do justice between the state and the prisoner, as if he had not heard the witnesses." He answered, "that his mind was as free to act as water without regard to the opinion formed." Whereupon the court decided that he was a competent juror. The prisoner's counsel proposed to ask the juror, "if it would not take evidence to remove the bias he had against the prisoner." Which question the court refused to be asked, refusing also any other interrogatories by prisoner's counsel.

The following are assigned as error :

1. The indictment was void, because it appears on the face of the record that there was no lawful grand jury of the circuit court at the time the indictment was found.

2. Because said grand jury was not lawfully impaneled.

3. Said indictment is void on its face, because it does not inform the defendant of the nature and cause of the offense charged against him. Nor does it conclude "contrary to the form of the statute," and is not a common law indictment.

4. It does not appear of record that said indictment was found by the assent of twelve grand jurors thereto.

5. No writ of special *venire facias* was issued. Nor is there any return thereon in the record.

6. The court erred in impaneling R. S. Maxey as a juror to try said cause.

7. The court erred in granting the second instruction for the state.

8. The court erred in refusing the third, fourth and fifth instructions for the defendant.

9. The court erred in overruling the motion for a new trial.

## Briefs.

*H. R. Ware*, for plaintiff in error, contended:

1. That § 2 of the act approved 5th of April, 1872, must be construed as qualifying parties as jurors, who have formed an opinion upon common rumor merely; otherwise it would be in direct conflict with art. 1, secs. 7 of the state constitution, which guarantees "a speedy and public trial, by an *impartial* jury of the county where the offense was committed." Where an opinion has been formed from talking to witnesses, disqualifies one as a juror. 1st Burrs' Trial, 419; Nelms v. The State, 13 S. & M., 500; Noe v. The State, 4 How., 330; Sam v. The State, 13 S. & M., 189; Alfred v. The State, 37 Miss., 296; Burtine v. The State, 18 Georgia, 534; Rice v. The State, 7 Indiana, 332; State v. Sater, 8 Iowa, 420.

2. That the evidence was not sufficient to sustain the verdict, being circumstantial and conflicting, and the case a capital one. 1 Starkie Ev., 577; Algeri v. The State, 25 Miss., 589; 2 Phillips' Ev., 451, or 283; McCann v. The State, 13 S. & M., 497; Caleb v. The State, 39 Miss., 721; Cicely v. The State, 13 S. & M., 202.

*J. D. Freeman*, on the same side, insisted:

1. That there was no legal grand jury as shown upon the face of the record, and that there could be no waiver of this objection by going to trial as an essential part of the record was wanting. 1 Bishop on Crim. Prac., p. 125. And that the prisoner may take advantage of the defect notwithstanding the waiver. Newcomb v. The State, 37 Miss., 383; Thomas v. The State, 5 How., 312; McQuillen v. The State, 8 S. & M., 597.

2. The petit jury were not lawfully selected from any special venire, lawfully issued, executed or returned into court, as required by law.

3. The verdict of the jury is void, because it does not state whether the penalty shall be death or imprisonment for life, as required by § 5 of act of 1872. This act conferred upon juries, "in all cases heretofore deemed capital," the exclusive privilege of adjudging the penalty, thereby repealing § 2630 of the code of 1871.

---

Opinion of the court.

---

4. The 2d charge given for the state is too broad, as it excludes the defendant from the right of self defense. The 3d, 4th and 5th instructions should have been given for defendant to have given him the benefit of a partial or full excuse for the killing, because of the adultery of the deceased with the wife of defendant.

*G. L. Potter*, on the same side, argued the case orally, and filed an elaborate brief, relying upon the same points made in the other briefs, and authorities there cited.

*G. E. Harris*, attorney general for the state, insisted:

1. That under the act of April 5, 1872, Maxey was a competent juror, and was such under the law as it existed prior to the passage of the act of April 5, 1872, and cited in support thereof, *Ogle v. The State*, 33 Miss., 383, and *Alfred v. The State*, 37 Miss., 296.

2. That the act of April 5, 1872, is not violative of the constitution of the United States, or of art. 1, sec. 7 of the state constitution.

3. That the evidence, though somewhat circumstantial was sufficient to sustain the verdict. *Algheri v. The State*, 25 Miss., 584; *James v. The State*; *McCann v. The State*, 13 S. & M., 471.

SIMRALL, J., delivered the opinion of the court.

Among the rights assured by sec. 7, art. 1 of the constitution, to persons subjected to a criminal prosecution, "is a speedy and public trial by an impartial jury of the county where the offense was committed."

An act of the legislature, therefore, which should direct a trial in secret, or which should encroach upon the qualifications of jurors in such wise as to weaken or endanger their impartiality, would be an infringement of this constitutional privilege.

The extent of the privilege is, that each member of the panel shall be indifferent and impartial, in that state of mind, unbiased

---

Opinion of the court.

---

by a preopinion or prejudice which would or might interfere with the just influence of the testimony on the mind.

It would not, therefore, be a matter of materiality from which source or by what influences the mind was wrought upon; if it was in that temper and disposition which biased or prejudiced it, the juror would not be impartial.

The privilege of the accused is, that impartiality shall characterize the panel. The mind is so constituted that every thing communicated through the medium of the senses and the association of ideas in reflection make an impression. These impressions vary in intensity and permanency as the mind was brought in closer or more remote contact with the scene or the narrative.

What is seen, or heard, or felt, is more vivid than a description or narrative by another. As the source of information is more remote from the immediate witnesses of transaction, the memory is less retentive, and the influence upon the mind less positive. The law avails of these experiences in determining upon the mental state of a juror.

If he was a witness of the transaction under investigation, necessarily some opinion must have been formed of the conduct of actors which either accuses or excuses them. If he has attended a former trial and heard the witnesses, necessarily an impression was made upon his mind. So if he has heard persons in whom he has confidence detail the circumstances, some bias naturally is created. Nor does it at all depend upon the integrity and moral honesty of the juror, as to the existence of the bias. Nor again, is it possible to know how much or how little it may contribute to the assent to the verdict.

The privilege is, an "impartial jury of the county." But it would not do to refine too much and fix the standard of qualification so high, as in many instances, to be unattainable. The telegraph and the newspaper have been so multiplied, and as we know, are so eager to gather and spread "news," that the knowledge of crime is communicated much more extensively

---

Opinion of the court.

---

than formerly, and that, too, among the most intelligent classes—the fittest material for the jury.

In many communities, especially the larger towns and cities, this is more especially the fact. To hold, therefore, that a juror who had received a vague, evanescent impression from a newspaper or rumor, but who did not imbibe such an impression as engendered an opinion or bias, who had a consciousness of freedom from prejudice, and of ability to form a verdict according to testimony, was incompetent, would be to press the point to an unreasonable length. The very question came into judgment in Lee's case, 45 Miss., 118, 119. There the juror "had formed an opinion from rumor, but said that it would not require testimony to remove it." It is very difficult by words to define accurately the "state" of the mind, so subtle are its operations. That juror had derived an impression or opinion from what he had heard floating as gossip or rumor, but it did not so fix itself upon the mind as to stand in the way of a fair investigation and an unbiased weighing and consideration of the testimony. Such was also the case of Sam v. The State, 13 S. & M., 194, quoted with approval in the former case.

Impartiality is the right of the accused and the aim of the law. If the juror has made up a *decided* opinion, whether from personal knowledge, the statements of witnesses, or from *rumor*, he is disqualified. Neely's case 13 Ill., 685. For the disqualification depends more on the nature and strength of the opinion than upon its source or origin. Boon's case, 1 Kelly (Ga.), 631; Banger's case, 14 La. Ann., 461.

The deduction from the cases in this court is, that although a rule of universal application is hard to be defined, this much seems to rest upon authority.

1. If the mind of the juror is so far prejudiced as to require testimony to annul a preopinion, derived from whatever source or origin, the juror is incompetent.

2. If the opinion has been engendered from personal knowl-

---

Opinion of the court.

---

edge from hearing the witnesses on a former trial, although the juror may disclaim that it would influence his verdict, and claim that he was unbiased and free to be governed by the testimony on the trial, such person is not indifferent.

3. If, however, the opinion is formed from rumor, and upon investigation, shall be shown not to be fixed, so as to create a bias or prejudice, which it requires testimony to remove or overcome, such person is a competent juror. Sam's case, 13 S. & M., 189; Alfred's case, 37 Miss. Rep., 296; Ogle's case, 33 Miss., 383; Lewis' case, 9 S. & M., 118; Nelm's case, 13 S. & M., 500; Cotton's case, 31 Miss., 509; King's case, 5 How., 734.

Let us test the fitness of R. S. Maxey, as a juror. On his *voir dire* examination, Maxey responded to a question put by the district attorney, that he had formed an opinion as to the guilt or innocence of the accused. He further answered that the opinion had been formed by talking with the witnesses. On further interrogation, he said, he thought he could decide the case according to the evidence adduced on the trial. The juror further stated that his mind was as free to act as water, without regard to the opinion formed. The counsel for the accused proposed to ask the juror if it would not take evidence to remove the bias he had against the prisoner, which question the court would not permit to be asked, and refused to permit any other interrogatories to be put by the defendant's counsel; but decided that the juror was competent, and he was accordingly sworn.

The question propounded on the cross examination was relevant and pertinent; and was well calculated to elucidate the strength of the juror's opinion. If it was of such force as to require testimony to remove it, then upon all the authorities he was disqualified. But the authorities go further. If the opinion has been engendered by hearing a former trial, or conversing with witnesses, or from personal knowledge, then the juror is incompetent. It is not left with the juror to determine as to his qualifications. When the facts are elicited, it is a question of law to be

---

Opinion of the court.

---

adjudged by the court. It is the property of the mind to receive impressions when hearing from an eyewitness the details of an alleged crime. Nor can it avoid forming an opinion as to the quality of the act, and of the action. Most men would be slow to admit that they could not discard such opinions, and render a verdict according to the evidence put before them on the trial. But experience has taught the danger of entrusting to such persons the issues of life or liberty; unconsciously to themselves, the preimpression or opinion may be a factor in making up the verdict.

Such was precisely the condition of the juror Maxey; he had formed an opinion from the testimony, or some of it, yet he was "free as water" "to act without regard to the opinion formed." He had an "opinion," but such was his self confidence, he was "free" still to receive testimony and pronounce the truth. But the law adjudges a juror to be biased, and not "free," who has formed an opinion from such a source, and so far doubts his moral ability to overcome its subtle influence that it pronounces such an one an incompetent juror.

The other assignments of error relating to the organization of the grand jury, the *venire facias*, and the jurisdiction of the court to try the defendant on the indictment, are all met and cured by §§ 729 and 2843, Code of 1871, and the expositions of them in Head's case, 44 Miss., 749, and Durrah's case, *ib.*, 795. The record is full on the point also of the finding of the indictment, and its return into court. After the grand jury has been sworn and impaneled, exceptions which go to the drawing, summoning, or to individual members, come too late. If the defendant goes to trial without being served with a copy of the special *venire*, the proper length of time, he will be taken to have waived it.

For the error in overruling the objection taken to Maxey, and admitting him a member of the jury, the judgment is reversed, and cause remanded for *venire facias de novo*.



---

Statement of the case.

---

50	278
74	756

## A. H. TAYLOR v. LOWENSTEIN &amp; BRO.

1. **DEEDS — UNREGISTERED — NOTICE THEREOF.** — It is well settled law in this state that the occupancy and open possession of land under an unregistered deed of conveyance or bond for title, or other contract of sale, imparts notice to creditors and subsequent purchasers, and gives them the same protection as though these written memorials of title had been recorded. Title bonds and other written contracts in relation to land should be acknowledged and recorded as deeds.
2. **SAME — SAME — LIEN THEREOF.** — A prior unrecorded deed is void against a judgment creditor of the grantor, of which he had no notice at the date of his recovery. Subsequently acquired knowledge will not affect the lien which has already attached. A judgment creditor has the right to appropriate the land to satisfy his judgment in preference to the right of the grantee of such debtor whose deed is unrecorded, of which the creditor did not have notice at or before the rendition of the judgment.
3. **BOND FOR TITLE — RULE WHEN PART OF THE PURCHASE MONEY IS PAID.** — When land is sold and bond given for title, if any portion of the purchase money be paid before judgment, the land is not subject to sale under execution as the property of the vendor. In such cases the title of the vendor is held in trust for the vendee. If the entire purchase money has been paid, then the vendee becomes, in equity, the complete owner of the estate.
4. **SAME — SAME — RIGHTS OF JUDGMENT CREDITOR.** — A judgment creditor of the vendor, at the date of executing the bond for title, can either sequester the purchase money by summons in garnishment, or he can bring a bill in chancery against the vendor and vendee, and ask that the equity of the vendor upon the land as security for the purchase money be applied to the satisfaction of his judgment.
5. **SHERIFF'S SALE — TITLE THEREOF.** — A purchase at a sheriff's sale like every other assignment by act of the law, only transfers the interest of the debtor, whatever it may be, and the condition it is in, subject to all the equitable and legal demands of other persons.

APPEAL from the Chancery Court of Chickasaw County. Hon. AUSTIN POLLARD, Chancellor.

The facts of the case sufficiently appear in the opinion of the court.

The only error assigned was decreeing for defendant in error and making the injunction perpetual.

## Briefs.

*Green & Pickens*, for appellant, contended: That the recent MSS. opinion of Reed, Adm'r, v. Ballentine, et al., Opinion Book "D," p. 414, was conclusive in the matter for appellant.

*McIntosh & Houston*, for appellees, contended:

1. That at the date of the rendition of Taylor's judgment, Thornton was a mere trustee of the title for his vendee, and the latter a trustee of the purchase money for the former. In each instance a lien was created upon the estate, which was superior to any judgment lien, and would prevail against any judgment creditor of Thornton, intervening between the time of the agreement to convey and the receipt of the consideration money and the actual conveyance. *Money v. Dorsey et al.*, 7 S. & M., 22.

2. That a vendor cannot elect to treat a contract of sale of land as at an end, even when no part of the purchase money is paid, after the same has fallen due. *Arther et al. v. Pearson*, 32 Miss., 131; *Jones et al. v. Loggins et al.*, 37 Miss., 546.

3. That possession of the land by Holloway, the vendee of Thornton, to whose rights Lowenstein & Bro. were subrogated, anterior to the judgment, was notice to Taylor, the judgment creditor. Such possession would have been sufficient notice to have defeated even a purchaser for value or mortgagee.

4. That a judgment creditor is not a purchaser, but is a mere volunteer, and can take under execution only that which belonged to the debtor, but cannot take the equitable interest of the *cestus que trust* under an execution against the trustee holding the legal title. *Kelly v. Mills*, 41 Miss., 267; *Walton v. Hargroves*, 42 Miss., 18.

5. That Lowenstein & Bro., having the title bond transferred to them by Holloway, were subrogated to all his rights, and having given Thornton a valuable consideration for the conveyance of the legal title, were guilty of no fraud.

6. That as Thornton was adjudged a bankrupt after the rendition of Taylor's judgment, and reported that judgment as required, in his schedule of liabilities — of which the law presumes

---

Opinion of the court.

---

Taylor to have had notice — this judgment was abrogated by his discharge.

7. That the cases of *Gibson v. Greene*, 45 Miss., 218; *Allen & Co. v. Montgomery et ux.*, 48 Miss., 110; *Reed, Adm'r, v. Burlington*, 49 Miss., 223, are not in conflict with this proposition.

SIMRALL, J., delivered the opinion of the court.

Thornton sold and executed a bond for title to James Holloway, in December, 1865. The deed to be made on payment of 12 bales of cotton.

Thornton being indebted to Lowenstein Brothers, who were pressing for the money, agreed to make the debt of Holloway available to pay off Lowenstein Brothers. He had already begun suit against Holloway by attachment. In this condition of affairs Lowenstein Brothers procured an assignment from Holloway of Thornton's bond, and Thornton conveyed the land to them, upon receiving a credit of \$1,200 on his indebtedness to them.

On the 5th of November, 1866, Taylor recovered a judgment against Thornton and others.

Under this judgment the land in controversy was levied upon.

In May, 1868, Thornton filed his petition in bankruptcy, and was subsequently discharged.

The controversy is between Taylor and Lowenstein Brothers, whether the land is or not liable to the judgment.

Taylor, in his answer, insists that the conveyance by Thornton to Lowenstein Brothers was fraudulent, and was made after he had recovered his judgment; and further, that Lowenstein Brothers had no connection with or rights under the title bond to Holloway.

Thornton, in his deposition, states the transaction between himself and the complainants, in substance as averred in their bill. That Holloway assigned his bond to them, and that he executed the deed on the consideration of a discharge of indebtedness of \$1,200, which he had contracted on the faith of the 12 bales of cotton to be paid by Holloway.

---

Opinion of the court.

---

Holloway went into possession on his purchase, and remained in possession in 1866, under this bond for title. After the conveyance to the complainants in the spring of 1867, he held under them. This was notice of his title, as available as would have been a registration of the title bond.

It has been accepted as the settled law in this state, since the case of *Dixon v. Lacoste*, 1 S. & M., 101, that the occupancy and open possession of land under an unregistered deed of conveyance or bond for title or other contract of sale, imparts notice to creditors and subsequent purchasers, and gives them the same protection as though these written memorials of title had been recorded.

Art. 24, Code 1857, p. 310, allows every title bond or other written contract in relation to lands, to be acknowledged or proved and recorded as deeds, and be held to give notice to subsequent purchasers.

In the case above referred to (1 S. & M., 101), it was held that creditors and purchasers, as respects notice, are put by the registry statute upon the same footing.

The cases of *Henderson v. Downing*, 24 Mis. Rep., 106, and *Harper v. Tapley*, 35 Miss. Rep., 506, hold that a prior unrecorded deed is void against a judgment creditor of the grantor of which he had no notice at the date of his recovery; and that subsequently acquired knowledge will not affect the lien which has already attached. The doctrine of these cases and of *Kelly v. Mills*, 41 Miss. Rep., 281, is that a judgment creditor has the right to appropriate the land to satisfy his judgment, in preference to the right of the grantee of such debtor whose deed is unrecorded, of which the creditor did not have notice at or before the rendition of judgment.

Taylor, the judgment creditor, by means of the occupancy and possession of the land by Holloway, had notice of his title, or the right under which he held, which was quite as effectual as if the title bond executed by Thornton had been acknowledged, or

---

Opinion of the court.

---

proved and recorded. He had notice that Holloway was in possession under this equitable title. That contract of sale and purchase put the respective parties in this relation: Thornton became trustee of the title for Holloway or his assignee, and the latter became trustee of the consideration price to Thornton. *Money v. Dorsey*, 7 S. & M., 22.

In that case, it was said, if any portion of the purchase money be paid before the judgment, the land can no longer be the subject of execution sale, as the property of the vendor, whatever might be the rule upon a naked contract of sale without any payment. If the entire purchase money has been paid, then the vendee becomes in equity the complete owner of the estate. *Ward v. Ledbetter*, 3 Dev. & Batt. Eq. Rep., 500.

The legal title of Thornton, at the date of the judgment, was held in trust for Holloway, who had acquired his equitable right before Taylor obtained his judgment. The right which remained substantially in Thornton, the judgment debtor, was to retain the title until the debt — the price — was paid to him. The creditor had a right to subject all of Thornton's interest to his judgment — that was, a claim to the title as security for his debt. If, therefore, the creditor can appropriate that interest, he gets all that the debtor had.

Two modes were open to him; either to have sequestered the debt by summons in garnishment, or to have brought a bill in chancery against Thornton and Holloway, and asked that the equity of Thornton upon the land, as security for the debt due him from Holloway, might be applied to the satisfaction of his judgment.

The judgment creditor would thus procure an execution of the trust for the satisfaction of his judgment, precisely as the creditor Thornton would have had a right to its enforcement for his benefit. *Coutts v. Walker*, 2 Leigh, 280.

The rule is, that a purchase at sheriff's sale, like every other assignment by act of law, only transfers the interest of the debt-

---

Opinion of the court.

---

or, whatever it may be, and in the state it is in, subject to all the equitable as well as legal demands of other persons. *Dudley v. Cole*, 1 Dev. & Batt. Eq. Rep., 429; *Butherford v. Green*, 2 Iredell Eq. Rep., 127; *Freeman v. Hill*, 1 Dev. & Batt. Eq. Rep., 389; *Hargroves v. Walton*, 42 Miss., 18.

If there is a right to sell the land when all the purchase money is due, it is difficult to see why it may not be sold when part is due. (The right so to do in the latter case was expressly denied in the case cited from 7 S. & M.) For, in both cases, the exact interest which the judgment debtor has, is the legal title as security for the unpaid purchase money.

If Thornton had transferred the debt, due by Holloway for the land, before the recovery of the judgment, could the sheriff's sale have defeated or impaired the right of the assignee to hold the land bound to pay him? Yet the legal title was as completely in Thornton as if such assignment had been made after judgment.

How can the judgment defeat the equitable title of Holloway or his assignee? Either of them had a right, by the contract of purchase, to demand a conveyance of the legal title upon payment of the price.

There existed a right in the judgment creditor, by appropriate proceedings, to have subjected the consideration money due to Thornton from Holloway, to the satisfaction of his judgment. He might have enforced, for that purpose, the equity retained by Thornton in the land.

But no movement of that sort has been made, and the debt to Thornton has been paid, and he has conveyed the land to Lowenstein Brothers, the assignees of his vendee. This transaction was assailed by Taylor, as a fraudulent contrivance between Thornton and Lowenstein Brothers to defeat his debt. No proof was offered to sustain the allegations. On the contrary, the testimony taken by the defendants show the transaction to have been fair and in good faith.

Let the decree dismissing the bill be affirmed.

---

Syllabus.

---

## MEMPHIS &amp; CHARLESTON R. R. Co. v. NARCISSA SCRUGGS.

## 1. ARBITRATION AND AWARD—EQUITY—JURISDICTION TO ENFORCE IT.—

Where parties submit a matter of controversy to the award of arbitrators, a court of equity has no peculiar jurisdiction to enforce the award, if it be for the payment of money only, but the court will interfere in the exercise of its ordinary jurisdiction as applied to the specific performance of agreements; and if the arbitrators, in the proper exercise of the power conferred upon them by the terms of the submission, award a specific performance, a court of equity will enforce such performance, though not made a special rule or order of the court.

## 2. SAME—SAME—JURISDICTION TO ENFORCE SPECIFIC PERFORMANCE.—

A court of equity has jurisdiction to enforce specific execution of an award concerning real estate, or of agreement for the purchase or sale of real estate, notwithstanding it involves the enforcement of an award to pay money. The jurisdiction of the court of equity will not be ousted and the ends of justice defeated, because of an obligation in the award to pay money.

## 3. SAME—TERMS OF SUBMISSION.—

Where, by the terms of the submission, the amount fixed by the award was to be a *lien* on the property, which could be enforced only in a court of equity, by sale under a decree of the chancery court, the *lien* attached upon the making of the award, and furnished an element of equity jurisdiction.

## 4. SAME—SAME—POWER TO DECIDE QUESTIONS OF LAW AND FACT.—

Where the terms of the submission confer upon the arbitrators the power and duty of construing a contract and ascertaining the value of the property to be surrendered by the terms of the said contract, thus involving questions of both law and fact, the arbitrators have the power and the right to decide both. Generally, arbitrators have full power to decide upon questions of law and fact, which arise directly or indirectly, in considering and deciding questions embraced in the submission. When not limited by the terms of the submission, they have the power to decide all questions of law necessary to the decision of the matter submitted, because they are judges of the parties' own choosing. Their decision of matters of law and fact, thus acting within the scope of their authority, their award is conclusive, and is within the principle of *res adjudicata*; it is a *final judgment* for that case and between these parties.

## 5. SAME—SAME—POWER OF A MARRIED WOMAN TO SUBMIT A CONTRO-

VERSY TO ARBITRATION.—At common law, the sole submission of a *feme covert* was void. By the custom of London, she could become a sole trader and carry on business; she could then submit disputes re-

---

 Brief for appellants.
 

---

specting her business to arbitration. But since a married woman cannot convey her real estate without the joinder of her husband in the deed, her sole submission of a dispute, which might result in her being ordered to make a conveyance, would be void; but if she join with her husband in the submission, it would be binding.

6. SAME — SAME — LEASES. — Leases are chattels real, and constitute a very important, and frequently a very valuable species of personal property, and as such, under the control and disposition of married women. By the purchase of a lease from the husband, by the wife, she becomes the owner of the lease, and had the right to convey the same, and hence, a submission of the same to arbitration would be binding on her, notwithstanding her coverture.
7. SAME — SAME — POWER OF THE MEMPHIS AND CHARLESTON R. R. Co. TO SUBMIT A DISPUTE TO ARBITRATION. — The resolution passed on January 25, 187-, by the board of directors, was as follows: "It was resolved, that the president is hereby authorized to receive the hotel at valuation as provided for by said contract." The company being a corporation aggregate, could act only through the instrumentality of an agent or attorney. The resolution conferred power upon the president of the railroad to "agree with the proprietor," and this has been held to authorize an agreement to pay such sum as arbitrators should award. *Alexandria Canal Co. v. Swan*, 5 Howard (U. S.), 88.
8. SAME — SAME — RATIFICATION OF THE ACTS OF AN AGENT IN SUBMITTING TO ARBITRATION. — Where the agent submitted a controversy to arbitrators, and the principal appeared by their agent and counsel without objection to the reference, it amounts to a ratification of the acts of the agent, in the submission, and estops the principal from making any objection after the award is made, so far as the acts of the agent are legal and valid.

APPEAL from the Chancery Court of Alcorn County. Hon. O. H. WHITFIELD, Chancellor.

The facts in the case fully appear in the opinion of the court.

*Ellett & Phelan*, for appellants:

1. The company is not bound by the contract of submission made by Wicks. He acted under an express authority. Such authority does away with all implied authority. This authority is introduced by the appellee. The authority is this: "Resolved, that the president is authorized to *receive* the hotel at valuation as



---

Brief for appellants.

---

*provided in the contract;*" this confers no power to make a new contract. The old contract does not give a *lien*. The new contract expressly undertakes to give a *lien* on the property. If Wicks had no authority to make a new contract, it is useless to criticise the *peculiar stipulation* of the contract he did make. In addition to the important violations and variations of the original contract, his agreement that a *lien should exist* upon the property, for valuation of the property, with *power* over the whole property, this was foreign to the original contract, and involves a possible loss of the whole property, by the enforcement of the *lien*, and this *lien* the bill now seeks to enforce. Mr. Wicks under the *express* authority, had no power to enter into a new contract, but simply to act under the *old one*. He *did* make a *new one*, in violation of the old one. This presents a question of agency, and has nothing to do with the form in which a *corporation* may enter into an *arbitration*, viz: by some corporate act, as by a vote or resolution. Watson on Arb., 23; 2 Cranch, 127; Angel on Corp., §§ 223, 129, 182, and 191.

2. Suppose the contract to be valid, still the bill must be dismissed for this reason. By the stipulation, quit claim deeds were to be executed by *Scruggs and wife*. These stipulations are *concurrent*, if not dependent acts, "at the same time," and in such case the party suing must make his part to be performed *precedent* by *preparing* or by offering to perform it. Unless he does this he cannot sustain his suit. 3 How., 415; 13 S. & M., 697; 10 S. & M., 562; 2 Parson Con., 532-33; 11 Humph., 300. This was not done.

3. *Mutuality* is the first essential to a binding contract of submission. If not *originally* binding on *both parties*, it will not be enforced against either. 17 Eng. C. L. Rep., 468; 1 Dallas, 391. Mrs. Scruggs was a married woman and the owner of the property when she entered into the contract. It was not binding on her at common law. Cited 28 N. Y. Rep., 17 Johns., 548; 9 S. and M., 435. The case at bar would not be sustained in the state of New York, as the case itself shows, in consequence of the *vast difference of facts*.

---

Brief for appellee.

---

4. Whatever was the *common law* in reference to the power of a married woman to enter into a contract of arbitration, has nothing to do with this case. The property belonged to Mrs. Scruggs, held under the statutes of Mississippi, for the protection of married women, and she could not make a contract to bind her property except in compliance with the law; this she did not do. Code, p. 335-36, art. 24; p. 313, art. 32; 13 S. & M., 137; 14 S. & M., 120; 41 Miss., 125; 44 Miss., 699; 2 John's Ch. 363.

5. This is not a case of judgment upon *mere facts*. By the submission the arbitrators were to decide the legal construction of a *written* instrument, being confined to legal evidence, deciding the legal instruction, and they did so, as is apparent on the face of the record, and the award is a nullity.

6. The award is *void* for the reason that the arbitrators did *not* award: 1. That which by the submission, they were required to do. 2. Because they did and would decide what they were *expressly prohibited* from deciding. 3. Because their decision, in regard to the points, expressly reserved, are illegal, wrong and absurd.

*W. L. Nugent*, on same side, filed an elaborate brief.

*Sale & Dowd*, for appellee:

1. It cannot be contended that the company was not fully advised of the contract made on the 24th of February, 1871, and that it appeared by its fully authorized agents before the arbitrators. It was decided that she was not a tenant at will, and only entitled to value of the buildings, but she had a perpetual lease.

The award gave Mrs. Scruggs \$31,666.60, and further that the amount should be a lien on the property until paid, and that she should then give to the company a quit claim deed.

*A specific performance of this award is sought and an enforcement of the lien.*

If Wicks had been a stranger to the company, the resolution would have been ample power. It reads as follows: "A communication from John W. Scruggs in reference to surrendering

---

Brief for appellee.

---

the Corinth Hotel to the company *at valuation* according to the terms of the contract of July 7, 1857, was received and read, and on motion it was resolved that the president is hereby authorized to receive the hotel at valuation as provided by said contract, unless before doing so he may deem it advisable to consult with this board."

To comply he must appoint referees, pay the money before he could receive the property. Scruggs had a lien on the hotel; he had built it; if nothing more, he had a mechanic's lien. If he sold it to the company, he had a vendor's lien. Scruggs was not bound to sell on a credit. Wicks was bound to make a contract, naming the referees, defining their power, and arranging for the time and manner of payment. Whenever a duty is imposed on a general or special agent, every power necessary to execute the trust is implied. 21 Pickering, 270-6; U. S. Bank v. Jacobs, 6 Humph., 515; 11 Allen, Mass., 526-31-53; Abbott's Digest, 578. We place the power of Wicks on higher grounds. The charter gives him power to make all contracts. The company is bound by the acts of its general agent, although he has secret instructions limiting his power, unless express notice is given to the other party (and we had no notice of the resolution). Story's Agency, § 73, 74. Even the attorneys of the company had the right to submit to arbitration. 14 Barb., 360; 9 Wheaton, 738; 9 Paige, 498, 496-500; 5 Howard (U. S.), 89; 11 Mass., 448-50; Abbott's Digest Corp., 676; 6 Barb., 579-80-81. The ratification by the company may be implied. The action of the company amounted to a ratification, and binds the corporation: 9 Paige Ch. R. (N. Y.), 496, 498; 12 Allen, Mass. R., 93, 96; Osburn v. U. S. Bank, 9 Wheat., 738; 5 Howard U. S. Rep., 89; 23 ib., 89; 11 Mass., 448.

2. Assuming that the arbitrators had no power to bind Mrs. Scruggs, yet she has absolutely executed her release; the part alleged to be void, is performed. Smith v. Sweeney, 35 N. Y. Rep.; 8 Tiffany, 292-6.

3. The old doctrine in reference to the mutuality of awards, is

---

Opinion of the court.

---

overruled by the modern cases. 2 Parsons on contracts, 5 ed., 695; Palmer v. Davis, 28 N. Y., 247-9.

4. It is insisted that the arbitrators erred in judgment in the construction of the contract, and the amount awarded, and that the court will set it aside. It being a mixed question of law and fact, the arbitrators could not determine the amount to be paid, without first construing the contract. This issue was fairly submitted to the referees, and decided in favor of the appellee. Whether they erred or not, the award must stand, unless there was fraud, corruption, or misconduct on the part of the arbitrators. Underhill v. Vancourtlandt, 2 Johnson's Ch. R., 340, 361, 370, 358-61, 363. In all cases where a question of law or fact, or both are submitted, the award is conclusive, and will not be set aside for an error of judgment, however much the chancellor may differ with them. He cannot substitute his judgment for theirs. Mickles v. Thayer et al., 14 Allen, 114; 12 East, 357; Cherry v. Cherry, 6 Vesey, 282; 2 Manning & Granger, 847; 13 Richardson, S. C. Rep., 9; 1 Henning & Munford, 468; 22 Eng. C. L. Rep., 603; 30 ib., 489; 11 Mass., 447; 6 Little, p. 1; 1 Vesey, Jr., 369; 17 Howard (U. S.), 349.

5. The arbitrators decided all that was submitted and nothing more. The parties agreed to surrender the property, and give a quit claim deed. The arbitrators had only to say, what shall be paid, and to arrive at this, had to construe the original contract.

PEYTON, C. J., delivered the opinion of the court.

This is an appeal from a decree of the chancery court of Alcorn county, enforcing the specific performance of an award.

The material facts of the case are, that on the 7th day of July, 1857, the Memphis and Charleston Railroad Company, and J. W. Scruggs entered into a contract, by the terms of which said Scruggs was to build a hotel on the grounds of the said company at Corinth now in Alcorn county, to be used as an eating house for said road. The said J. W. Scruggs was to erect the buildings

---

Opinion of the court.

---

and make the other improvements at his expense, and pay the said railroad company two hundred and fifty dollars per annum, for the use of the ground occupied by said improvements. He was to keep a first rate eating house, satisfactory to the company, and if the company should become dissatisfied with the character of the house kept, then they were to have the right to pay to the said J. W. Scruggs the value of his improvements at the time, and take possession of the property; and in case said Scruggs should become dissatisfied with the schedule of the road or its management, then he was to have the right to give up the said improvements, and require the said company to pay him their value *at the time of such surrender*. In either case, the property to be valued by disinterested parties. The said Scruggs was to board all the officers and employees of said company at the usual and customary rates charged by other eating houses on said road. and this contract was to be binding on both parties so long as mutually agreeable.

Some time after the making of said contract, the said J. W. Scruggs conveyed his entire interest in said property to his wife, Narcissa Scruggs. It became agreeable to both parties that the said property should be surrendered to the said company, on the payment of the amount due the said Narcissa Scruggs for the value of the said property under the contract. But the parties being unable to agree as to the construction of said contract, and upon the amount of the value of said property to be paid upon the surrender thereof to said company, on the 24th day of February, 1871, the said parties entered into a written agreement to refer the *construction of said contract and the amount to be paid for said property* to the said Narcissa Scruggs, upon her surrender of the same to the said company, to the arbitrament and award of R. C. Brinckell, R. O. Reynolds and F. L. Pledge, and the amount so fixed by the award, was, by the terms of the agreement of submission, to be a *lien* on said property.

On the 20th day of April, 1871, the arbitrators met at the

---

Opinion of the court.

---

Scrugg's House, in the town of Corinth, and the parties appearing by their counsel, and after hearing the contract and the agreement of submission read and the evidence offered by the parties, and the arguments of counsel, did award, order and decree in writing, that the said railroad company pay to the said Narcissa Scruggs the sum of thirty-one thousand six hundred and sixty-six 66-100 dollars on the surrender of said property.

The appellants make the following assignments of error :

1. The court had no jurisdiction, there being no ground for equitable relief.
2. The award was void, because it went beyond the power of the arbitrators.
3. The submission was void, being by a married woman, and without authority from the appellants.
4. The court below should have dismissed the bill.

With respect to the first assignment of error, involving the question of the jurisdiction of a court of equity to enforce specific performance of awards, it may be observed that the interference of the court in such cases being in exercise not of any jurisdiction peculiar to awards, but of its ordinary jurisdiction as applied to the specific performance of agreements, it follows that many if not all the principles applicable to ordinary suits of that nature must apply. Had this award been for the payment of money only, the remedy would have been full, adequate and complete at law, and a court of equity would have had no jurisdiction to enforce a specific performance of it. There would have been no element of equity in it to authorize the interposition of a court of chancery. In England, the court of equity has in many cases decreed the specific performance of awards, though not made rules or orders of the court for the performance of some specific thing, as to convey an estate, assign securities or the like, but not awards simply to pay money. Fry on Specific Performance of Contracts, 510. And in reference to the specific performance of awards simply to pay money, the general rule of

---

Opinion of the court.

---

this country seems to coincide with that of England. *Turpin v. Banton*, Hardin, 312; *Story v. Norwich & Winchester Railroad Co.*, 24 Conn., 94, and *Bubier v. Babier*, 24 Maine, 42. A court of equity has jurisdiction to enforce specific execution of an award concerning real estate or of an agreement for the purchase and sale of real estate, notwithstanding that it involves the enforcement of an award to pay money. It is clearly not the rule to suffer the ends of justice to be defeated, and the jurisdiction of equity to be ousted, because of an obligation in the award to pay money. *Fry on Specific Performance*, 510, in note (1).

By the terms of the submission the amount fixed by the award was to be a *lien* on the property, which could be enforced only in equity by a sale of the property under a decree of the chancery court. Under the agreement this *lien* attached upon the property upon the making of the award by the said arbitrators, and furnished an element of equitable jurisdiction. And it was agreed by the parties to the submission that the award or "decree, as it is called, of said arbitrators shall be entered as a decree of the chancery court of Alcorn county." This, we think, is substantially a compliance with article 2 of the Code of 1857, page 371, which provides that it shall and may be lawful for all merchants and traders and others desirous to end any controversy by arbitration, to agree that their submission of the matter in controversy to the award or umpirage of any person or persons, should be made a rule of *any court of record* which the parties shall choose, and to insert such, their agreement, in their submission. This was done, and gives the court of chancery, which is here regarded as a court of record, jurisdiction of the case.

The second assignment of errors makes it necessary to inquire whether the arbitrators exceeded their power in making their award, and this involves the question of the power conferred upon them by the agreement of submission. By reference to that instrument, it will be seen that the construction of the agreement or contract and the value of the property to be paid for on

---

Opinion of the court.

---

its surrender, were the only questions submitted to the arbitrators for their decision and award. These were the only questions submitted to them; the first being the construction of the contract, which is matter of law, which is proper for the decision of the court, and the other as to the value of the property to be paid for on its surrender to the railroad company, was a matter of fact, proper to be decided upon the evidence. The submission clearly shows that the parties could not agree as to the construction of contract, and the value of the property, and hence the submission of these questions to arbitration.

It is objected by counsel for the appellants that the arbitrators were mistaken in point of law in supposing that the lease was a perpetual lease, subject to be defeated by the failure to keep a good eating house, and by a change of schedule even if they were mistaken in the character of the lease, that would not render the award void. But were they mistaken in the character of the lease? Taylor in his valuable work on the Law of Landlord and Tenant, when speaking of perpetual leases, says, at page 52 in section 72, "that there may be leases to continue so long as the lessee shall continue to pay the rent and perform the covenants contained in them." The lease was not a tenancy at will, as supposed by counsel, but one of indefinite duration, determinable upon the happening of either of two future contingencies, to wit, the failure of Scruggs to keep a first rate eating house and pay the rent, or the change of schedule on the part of the railroad company. It could not be terminated at the mere will of either party, but only by mutual agreement, or the happening of one of these events.

It must be conceded that there was considerable diversity of opinion among the witnesses as to the value of the property at the time of the arbitration. Mr. Sawyer, in his testimony, says: "I consider the improvements worth, under the restrictions of said contract, in cash in the market, from thirty to thirty-five thousand dollars," and J. W. Scruggs testified that they were worth under



---

Opinion of the court.

---

the restrictions of the contract, about forty thousand dollars. In estimating the value of the improvements at the time of the reference and surrender, the arbitrators were evidently not governed by the first cost of the buildings and other improvements, or what it would cost to make them anew; but were probably governed by their increased value after they were made, taking into consideration the use, purposes and business for which they were erected. Be this, however, as it may, they had an undoubted right to construe the contract, and estimate the value of the property at the time, upon the testimony before them, and although they may have erred in either or both of them, we do not feel authorized to declare their award void as an act *ultra vires*.

The ablest discussion of the subject is to be found in the opinion delivered by Chief Justice SHAW, in the famous case of the Boston Water Power Co. v. Gray, 6 Met., 131. Very valuable interests were involved in this litigation. The arguments were made by the foremost counsel in New England, and the elaborate opinion in which this distinguished jurist embodied the results of his careful examination into the subject is probably unsurpassed in this country. The language of the judge is: "In general, arbitrators have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and deciding the questions embraced in the submission. When not limited by the terms of the submission, they have authority to decide questions of law necessary to the decision of the matter submitted, because they are judges of the parties' own choosing. Their decision of matters of fact and law, thus acting within the scope of their authority, is conclusive, upon the same principal that a final judgment of a court of last resort, is conclusive; which is, that the party against whom it is rendered can no longer be heard to question it. It is within the principle of *res judicata*; it is the *final judgment* for that case and between these parties. It is amongst the rudiments of the law, that a party cannot, when judgment is relied on to support or to bar an action, avoid the effect of it by proving, even if

---

Opinion of the court.

---

he could prove to perfect demonstration, that there was a mistake of the facts or of the law." When the parties have expressly or by reasonable implication submitted the questions of law as well as the questions of fact, arising out of the matter in controversy, the decision of the arbitrators on both subjects is final. It is upon the principle of *res judicata*, on the ground that the matter has been adjudged by a tribunal which the parties have agreed to make final, and a tribunal of last resort for that controversy; and therefore it would be as contrary to principle for a court of law or equity to rejudge the same question, as for an inferior court to rejudge the decision of a superior, or for one court to overrule the judgment of another, where the law has not given an appellate jurisdiction, or a revising power, acting directly upon the judgment alleged to be erroneous. Morse on Arbitration and Award, 293.

"We take one principle to be very clear," says Chief Justice PARKER, "in the case of Jones v. Boston Mill Corporation, 6 Pick., 148, that where it manifestly appears by the submission that the parties intended to leave the whole matter, law and fact, to the decision of arbitrators or referees, the award is conclusive, although they should have mistaken the law, unless the award itself refers such question to the consideration of the court." A mere error in judgment is no mistake which a court of equity can correct, since the judgment of the chancellor is as fallible as that of the arbitrator. Vanderwerker v. Vermont Central Railroad, 27 Vt., 130, and 2 Story's Equity, 721, sec. 1456.

The work last referred to lays down the doctrine, that arbitrators, being the chosen judges of the parties, are, in general, to be deemed judges of the law as well as the facts, applicable to the case submitted to them. If no reservation is made in the submission, the parties are presumed to agree, that every question both as to law and fact, necessary for the decision, is to be included in the arbitration. Sec. 1454.

The third assignment calls in question the power of a married

---

Opinion of the court.

---

woman to submit to arbitration. By the general rule of the common law, the sole submission of a *feme covert* is void. For her husband was entitled to her chattels, real and personal, and to her *choses in action*. Nor could she alien her real estate by her own sole deed. By the custom of London, a *feme covert* may carry on business as a sole trader, and "it is apprehended," says Russell on Arbitration, 16, that "she might refer disputes respecting her business to arbitration." But even at common law, a married woman could submit concerning her separate property over which she may have the power of disposition as a *feme sole*. Under the statutory liberality of modern times, there is no good reason to doubt that the enactments in the various states, going the length of giving to a married woman the sole ownership, control and power of conveyance in respect of her personality, and often the power to conduct business on her own sole and separate behoof, would be construed as by necessary implication, giving her the appurtenant power to enter into a submission in relation to such personality or business. But since a wife cannot convey her real estate without the joinder of her husband in the deed, her sole submission of a dispute which might result in her being ordered to make a conveyance, would properly be held void on the general principle that her power was not coextensive with her undertaking. But if she join with her husband in a submission of this description, the agreement will be binding.

But even in England and under the ancient doctrine of the common law, some exceptions were allowed to establish themselves. Thus where parties had knowingly and voluntarily entered into submission with a married woman, if the award were in her favor they were held bound by it. Russell on Arb., 17; *in re Warner*, 2 Dowling & Lowndes, 148, and *Palmer v. Davis*, 28 New York, 242. See on this subject, *Emery v. Wase*, 5 Vesey, Jr., 846, and *Weston v. Stuart*, 2 Fairfield, 326.

Leases are chattels real, and constitute a very important, and frequently, a very valuable species of personal property, and as

---

Opinion of the court.

---

such under the control and disposition of married women. By the conveyance from Scruggs to his wife, she became the owner of the lease, as well as of the improvements, and had a right to dispose of it as her personal property, and therefore a submission of the same to arbitration would be binding on her, notwithstanding her coverture. The view we have taken of the three first assignments of errors, it will be perceived, fully disposes of the fourth.

It is contended by counsel for appellants that M. J. Wicks, the president of the Memphis and Charleston Railroad Company, had no authority to enter into the submission on behalf of said company. We think the resolution passed by the board of directors of the company on the 25th day of January, 1871, conferred the authority upon the president to submit to arbitration as a mode of ascertaining the value of the property by disinterested parties, as provided in the original contract. On that day the minutes of the board of directors show "it was resolved that the president is hereby authorized to receive the hotel at valuation as provided for by said contract." The appellants being a corporation aggregate, a mere artificial being, could act only through the instrumentality of an agent or attorney. A power to "agree with the proprietor" of land for the purchase was held to authorize an agreement to pay such sum as arbitrators should award. *Alexandria Canal Company v. Swan*, 5 How. (U. S.), 83. So we think the authority conferred by the board of directors upon the president to receive the hotel at the valuation of disinterested parties, clothed him with the power to refer to arbitration. And the appearance of the appellees before the arbitrators, by their agents and counsel without objection to the reference, amounts to a ratification of the act of the agent, and estops them from making any objection to the submission after the award was made. Where the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings or omissions of his agent, he will be bound thereby as fully, to all intents

---

Opinion of the court.

---

and purposes, as if he had originally given him direct authority in the premises, to the extent which such acts, doings or omissions reach. Story on Agency, 283, sec. 239.

At common law, however, there is a distinction between the ratification of acts which are void and the ratification of those which are voidable. In the former case, the ratification is inoperative for any purpose whatever; in the latter, full validity is given to the acts. Acts which are illegal, immoral or against public policy fall within the former class. For, in such cases, the original contracts or acts being void, ought not to be allowed to acquire any validity from their being subsequently confirmed; since the same noxious qualities adhere to the ratification as existed in the original transaction. But whatever may be the force of this distinction in the former class of cases, properly understood, it is not applicable to cases of agency, where a party assumes to act, not for himself but for another, without any authority whatsoever, or by an excess of the authority delegated to him, in cases where the principal may lawfully do the act. In all such case, if the principal subsequently ratifies the act, he is bound by it, whether it be for his detriment or for his advantage. And a ratification once deliberately made, with full knowledge of all the material circumstances, cannot be recalled. Story on Agency, sec. 242.

As the corporation may lawfully be a party to a submission to arbitration, and as this can be effected only through an agent, it follows that the submission of the agent, although it may be in excess of authority, may be ratified by the corporation, as well by its acts as by express confirmation. And this we think was done by its appearance before the arbitrators by its agent and attorney, without objection to the authority of the arbitrators. This conduct and act on the part of the railroad company was a recognition of the authority of the arbitrators, and amounted to a ratification thereof.

Even had this been the verdict of a jury, there is evidence to sustain it, and this court would be very reluctant to disturb it.

---

Opinion of the court.

---

But, as a decision of the questions referred by judges of the parties' own selection, in the absence of fraud, corruption, partiality or undue means employed in procuring the award, we do not feel authorized to disturb it.

In reference to the questions submitted, the language of the agreement of submission is as follows: "It is distinctly agreed that only the questions of the legal construction of said agreement as to the value of said improvements, and the amount which shall be paid, are submitted to said arbitrators, and all other questions arising under said agreement, whether as to the right of the parties to recover damages or otherwise, are hereby expressly reserved." From this, it will appear, as before stated, that there were only two questions referred: one a question of law involving the construction of the contract; and the other a question of fact, depending for its solution upon the evidence adduced.

Questions of pure law are sometimes directly submitted, as we think was done in this case in reference to the construction of the contract. In such cases, it makes no difference whether or not the arbitrators decide them as the court would see fit to do. The award, whether it meets the view of the court or not, is final and conclusive. The agreement of the parties is, substantially, that they will be bound by whatever the arbitrators declare to be the law between them, and by this agreement they are bound. Morse on Arbitration and Award, 314 and 315.

As matters of fact are peculiarly within the arbitrators' authority, less hesitation has been manifested in treating as conclusive the finding of arbitrators upon facts, than their rulings upon principles of law. The absence of technicality leaves no room for questioning the accuracy of their knowledge. As intelligent men, they judge of the facts and merits finally, as a jury does. The department is peculiarly their own. That their discretion and judgment upon all questions of fact or merits are absolutely final, and not subject to review or examination, is a leading principle often enunciated, and nearly, though not quite, universally ac-

---

Syllabus.

---

cepted in the law concerning arbitration. Chief Justice Shaw in the case before cited of *Boston Water Power Company v. Gray*, says: "It has long since been settled that awards are conclusive on all matters of fact submitted to the arbitrators." *Morse on Arb.*, 316.

Upon the whole, we can perceive no error in the decree of the court below, and the same must therefore be affirmed.

The decree is affirmed.

---

W. H. BASS et al. v. JOHN H. ESTILL et al.

1. PRACTICE—OFFICE CONFESSION OF JUDGMENT—ITS EFFECT.—Under the statute (Code of 1857, p. 523), an office confession of judgment must be confirmed by the court before it becomes a judgment. When confirmed, the lien thereof does not relate back to the time of confession, but only to its confirmation.
2. SAME—DEEDS IN TRUST—REGISTRATION.—A deed in trust, which was not acknowledged although registered, is no notice to third parties, and is a nullity as to all the benefits conferred by the statute upon a properly registered instrument. *Work v. Harper et al.*, 24 Miss., 517; *Tillman v. Cowand*, 12 S. & M., 262. But such an instrument is valid as to all parties who have actual notice of its contents. *Wallis v. Cooper et al.*, 24 Miss., 228.
3. PARTNERSHIP AND INDIVIDUAL CREDITORS—RIGHTS THEREOF.—The creditors of a partnership have a preference to the exclusion of the creditors of an individual member, the rights of the latter extending no further than to the surplus interest of the individual member after the joint liabilities have been satisfied. *Irby v. Graham*, 46 Miss., 425.
4. SAME—MARSHALING ASSETS—CASE IN JUDGMENT.—B., the judgment creditor, having notice of the trust deed of E. & F. and E. & Son; *held*, that the conveyance confers a preference to the extent of \$5,000—the sum named in it—to all the property embraced in it, both joint and several. The cotton being the fund first appointed to pay the trust debt, that must first be exhausted, then other joint assets, and, lastly, the individual property of E. When the trust creditors have been satisfied out of the joint assets, the judgment creditor has the right to the proceeds of the individual property of E., and also to the surplus interest of E. in both firms.

---

Statement of the case.

---

APPEAL from the Chancery Court of Bolivar County. Hon. E. STAFFORD, Chancellor.

The bill in this case states substantially that on the 7th day of January, 1870, Jno. H. Estill purchased from the complainants forty mules and one horse, for the sum of \$6,425, upon an agreement that he should give them therefor his draft on and accepted by his brother C. R. Estill, of Richmond, Ky., with interest, until the maturity of the draft, at ten per cent., the draft maturing October 15, 1870. That Estill at the time assured complainants that his brother would accept his bill on presentation. Relying upon this assurance, the mules and horse were sold and delivered, and Estill gave his draft as agreed upon, but when it was presented for acceptance, C. R. Estill declined and refused to accept it, stating that he knew nothing about the transaction, and had never agreed to accept, and would not accept the draft. That John H. Estill was well aware at the time he gave the draft that his brother would not accept it, and knew that his representations were false, and simply designed to obtain possession of the mules and horse, so as to compel some other settlement for the purchase money, and secure the possession of them for twelve months. That having obtained possession of them falsely, he removed them from Washington to Bolivar county, and delivered them in part to his son Eugene Estill, and in part to Charles Ferris, both of whom were engaged with him in the cultivation of two separate plantations in Bolivar county. As soon as it was ascertained by John H. Estill that his draft was not accepted, he sent complainants a draft on, and accepted by his son and said Ferris, for the price of the mules given to each. Which complainants declined to accept, inasmuch as both of the parties were wholly without means. Complainants visited Estill and demanded settlement, and he agreed to give an office confession of judgment for the debt, with stay of execution until Nov. 1, 1870, with a deduction for the value of one horse, that had died in the possession of Estill. In pursuance of this agreement, on the — day of April,



---

Statement of the case.

---

1870, said Estill entered in the office of the circuit clerk of Bolivar county, a confession of judgment, with interest calculated up to April 25, 1870, when the next term of the circuit court of said county should have been held, the whole amount of the debt being \$6,458.30. No term of the court was held in April; but in August, 1870, the office confession of judgment was duly confirmed, and the proper judgment entered by said court against said Estill in favor of complainants.

On the same day upon which the confession of judgment was entered, Estill filed in the office of the chancery clerk of Bolivar county, a deed in trust upon the mules, to Toof, Phillips & Co., conveying the same mules purchased from complainants, which was filed after the office confession of judgment was entered.

Besides the mules, the trust deed to Toof, Phillips & Co., covered the crops of cotton to be grown by said Estill and Ferris, and Estill & Son. This trust deed was given on the mules and crop to secure advances to be made by Toof, Phillips & Co., to the amount of \$5,000.

The prayer of the bill is for an injunction and receiver, and at the hearing, that the mules, cotton and corn of Estill be sold, and the proceeds applied first to complainant's judgment, or for general relief.

The injunction was issued and executed, and when the motion for receiver came up for hearing, it was agreed between the parties that to prevent loss, etc., Toof, Phillips & Co. should take the mules for the sum of \$3,500, and should hold that amount to abide the final decree of the court. It was further agreed that the injunction should be so far modified as to allow the cotton to be forwarded to, and sold by Toof, Phillips & Co., and the proceeds held subject to the order of the court.

The deed in trust to Toof, Phillips & Co., by Estill, was dated April 4, 1870, was not acknowledged and was filed for record April 12, 1870. The answers set up that John H. Estill had only a half interest in the several crops, and claim that the parties pur-

---

Brief for appellants.

---

chased a half interest in the mules long before the confession of the judgment by Estill.

Toof, Phillips & Co. answer: They knew nothing as to the mule purchase, nor of the circumstances attending the same, and deny all fraud charged. Claim that their deed was filed prior to the office confession of judgment, and that complainants had full notice thereof.

All the accounts between Toof, Phillips & Co., and Estill & Ferris, and Estill & Son, were referred to a commissioner, who made due report to the court.

To this report proper exceptions were filed, which were overruled by the court and an appeal was taken to this court.

The errors complained of are:

1. The court erred in decreeing that Toof, Phillips & Co., were entitled to retain in their hands to the credit of Estill & Son and Estill and Ferris, the sum of thirty-five hundred dollars, the proceeds of the sale of the mules and personal property sold by agreement of parties in the progress of the cause in the court below.

2. The court erred in decreeing in favor of Toof, Phillips & Co. the proceeds of all cotton and other goods shipped to them by Estill & Son and Estill & Ferris.

3. The court erred in not decreeing both of said amounts in favor of the appellants, and in overruling exceptions to the commissioner's report.

*W. L. Nugent*, for appellant:

1. The trust deed was never acknowledged as the law provides, was improvidently admitted to record, and is inoperative as against the judgment of the appellants. *Work v. Harper*, 24 Miss., 517; *Tillman v. Coward*, 12 S. & M., 262; Code of 1857, art. 310.

2. The appellants are judgment creditors, holding a lien by enrolment upon the crops and mules also; and if it be conceded that the lien of Toof, Phillips & Co. upon the cotton was superior to that of the appellants, the crop sales should have been applied and exhausted before any call could be made upon the mules. *Keaton*

---

Opinion of the court.

---

v. Miller, 38 Miss., 630; Ingalls v. Morgan, 10 N. Y., 178; Glass v. Pullen, 6 Bush. (Ky.), 346; 1 Story's Eq. Jur., §§ 633, 642.

3. The ordinary doctrine of the application of partnership assets does not prevail as against the judgment of the appellants. Young v. Frier, 1 Stock., Ch. 465; 1 Story's Eq. Jur., § 676, note 3; ib., § 677. But at any rate the mules held by Estill & Son were liable to the judgment, and the decree was manifestly wrong to that extent.

4. The appellants are entitled to a decree against Toof, Phillips & Co., for the value of the mules. They were receivers of the money raised by a sale of the mules under the order of the court, and are bound to answer for it notwithstanding their bankruptcy. If it has passed into the possession of the assignees, they are answerable for it as trustees.

The reporters find no brief on file for the appellees.

SIMBALL, J., delivered the opinion of the court.

This is a controversy between W. H. & R. T. Bass, judgment creditors of John H. Estill and Toof, Phillips & Co., now represented by their assignee in bankruptcy, under a deed of *cestui que trust*, executed by Estill for their benefit. The property to which the respective creditors asserted a lien, has by consent been sold, and their respective claims are made to the fund realized.

W. H. & R. T. Bass assert that their judgment is older than the trust deed, and therefore they have the superior right. On the contrary, Toof, Phillips & Co. contend that their deed in trust was elder. But whether that pretension be sustained or not, they insist that the forty mules, the chief element in the contest, were one-half of them, the joint or partnership property of Estill and Ferris, who were planting partners in 1870. And the other half were the partnership property of Estill & Son, who were planting together also in the same year; and that the members of these respective firms united in the deed of trust to secure advances to be made for the production of the crops. These advances are

---

Opinion of the court.

---

recited in the deed to be made "to J. H. Estill, J. C. Ferris and E. H. Estill, composing the firms of Estill & Ferris, and Estill & Son." John H. Estill, with Ferris, composed one firm, and he and his son the other. Each firm cultivated separate plantations, kept independent accounts, and had separate transactions with these merchants.

The mules, plantation implements, and crops of cotton and corn to be grown in 1870, were the property included in the deed in trust.

John H. Estill made an office confession of judgment in favor of the Messrs. Bass, on the — day of April, 1870. That judgment was approved and confirmed by the circuit court on the — day of August (the previous April term had failed).

The counsel for the appellants is in mistake in supposing that W. H. & J. T. Bass acquired the benefits and liens of a *judgment* before its confirmation by the circuit court. The act done by the debtor before the clerk in vacation, "is an acknowledgment of indebtedness" (to his creditors), and "consent given for judgment to be rendered against him, at the next term of said circuit court (in favor of the creditor) for the amount and costs accruing thereon." When the plaintiffs' "statement," and the debtors' "acknowledgement" of the above purport are filed, the "clerk shall docket the cause on the appearance docket;" "and at the next term, on motion of the plaintiff, the court shall render judgment and such judgments shall be binding unless set aside during the term," etc. Code 1857, pp. 523-4, arts. 257, 258. The statute seems to be specific and plain, that the plaintiff does not acquire a judgment, until the court pronounces it. W. H. & R. T. Bass obtained a judgment at the August term of the circuit court, and not in the previous April by reason of anything that occurred before the clerk in vacation. Nor does the statute give countenance to the idea that for any purpose, of lien, or any other advantage, the judgment relates back to, and takes effect from the office confession.

---

Opinion of the court.

---

The deed in trust purports to have been executed the 4th of April, 1870. It was filed for record the 12th of that month, and was recorded by the clerk. But the deed was not acknowledged by the grantor, nor was it proved by a subscribing witness. There was no authority of law to admit this deed to record, and its registration did not have the effect of notice to subsequent purchasers and creditors. In fact it was a nullity as to all the benefits conferred by statute upon a properly registered instrument. *Work v. Harper*, 24 Miss. Rep., 517; *Tillman v. Cowand*, 12 S. & M., 262.

If the rights of Toof, Phillips & Co. stood alone upon notice imparted by the record, it would no more avail them, than if the instrument had never been filed in the office and recorded.

But the appellants, the Messrs. Bass, had notice of the deed the same day that the office confession was taken.

The attorney for the appellants testifies that the deed was presented at the office, just after the papers for the office confession had been prepared, and requested notice to be taken that that proceeding had been first instituted. One of the appellants was present at the time. It appears that these parties were aware of the nature and purposes of the deed. See *Wailes v. Cooper et al.*, 24 Miss., 228.

Assuming it as proved that the appellants had notice of the deed in trust, any lien acquired by their judgment on the property embraced in it was subordinate to that security.

It has been argued for the appellants, that the sale and purchase of the mules had not been consummated until the office confession of judgment by Estill. Sometime prior to that, how long does not appear, the appellants sold and delivered the mules to Estill for a draft on his brother who resided in Richmond, Kentucky, on the assurance that it would be accepted. The draft was sent from Bolivar county, Mississippi, to Richmond for acceptance.

When it returned dishonored, John H. Estill sent the appel-

---

Opinion of the court.

---

lants a draft on E. Estill his son, and J. C. Ferris, which was declined and returned, and, thereupon, the matter was settled by the office confession of judgment. But the mules had already been delivered to John H. Estill. Ferris states in his deposition that he bought an undivided half interest in twenty of the mules *before* the deed in trust was executed. W. N. Hood was present when the sale was made. The mules were delivered when the draft was drawn. It may be true as claimed by the counsel for appellants, that John H. Estill practiced a fraud upon the appellants by giving the draft on his brother, and they might have annulled the sale and reclaimed the mules upon the dishonor of the draft. But they did not pursue that course, but adopted means satisfactory to themselves to secure the debt.

It becomes important to analyze the several interests of the grantees in the deed in trust to the mules, so as to settle the conflicting equities of the parties claiming them or the money arising from their sale. An undivided half interest in twenty of the mules had been sold by John H. Estill to Ferris, and were held by them jointly as partnership stock before the execution of the deed in trust. These mules, on the plantation jointly cultivated by John H. Estill and Ferris, passed by the conveyance as joint or partnership effects.

E. Estill, in his answer, specifically states the terms of the partnership with his father, viz.: That he was to reside upon, take charge of and manage the two plantations, Lenoir and Lake. "His father to furnish the necessary *team* and the land," and the net proceeds to be equally divided after the expenses were paid.

The mules put by John H. Estill on these plantations were his individual property; his son had no ownership in them; his interest was limited to a use of the animals for the year in the production of the crops.

These twenty mules were not partnership property, and there was, therefore, no right in Toof, Phillips & Co., to assert a superior claim to them on the ground merely, that they constitute joint

---

Opinion of the court.

---

assets, and should be first applied to the partnership debts. But it was competent for John H. Estill to pledge them as a security to these merchants for the supplies and advances made to the two partnerships. So far as the deed in trust created a security, and no farther, have Toof, Phillips & Co., by reason of it the advantage over the appellants. The trust deed is only a security to the extent of \$5,000. To whatever extent these merchants may have advanced beyond that sum, the security can only stand as against the judgment creditors as protecting the sum named in it.

The parties to that conveyance plainly intended the trust debt should be primarily liquidated by the cotton. As fast as prepared for market, the grantors engaged that it should be shipped to the trust creditors at Memphis for sale. The security embraces both partnership property and the individual property of John H. Estill. In marshalling the assets, as between Toof, Phillips & Co., and the judgment creditors of John H. Estill, it should be done upon the rule, of first applying the joint fund, upon which they have the lien, to pay their debt, and resorting to the individual property to supply a deficit. *Irby v. Graham*, 46 Miss. Rep., 430.

If the crops of cotton and corn, produced by the partnership of Estill & Son, will liquidate their debt, they ought to be confined to it, so that the individual property of John H. Estill may be appropriated to the judgment creditors. It does not appear that John H. Estill had separate effects upon the plantation, cultivated on account of himself and Ferris. The effects of that partnership, including the crops of cotton and corn, ought to pay the account of that partnership. But the deed has this further benefit for the *cestui que trust*, namely: that all the property named in it, whether owned jointly or individually, stands as a security for the indebtedness of both the partnerships, to the extent of \$5,000. The equities of the parties stand in this category:

The trust creditors have a preference over the judgment credit-

---

Opinion of the court.

---

ors, to all the partnership effects of both the partnerships, whether plantation implements, mules, cotton or corn, and that for the whole amount of their advances, although in excess of the \$5,000 named in the deed of trust. That right rests upon the principle stated and illustrated in *Irby v. Graham*, 46 Miss., 425, and subsequent cases, to wit: That the creditors of a partnership have a preference to the joint funds and assets, to the exclusion of the creditors of an individual member of the partnership. The rights of the latter extending no farther than to the surplus interest of the individual member after the joint liabilities have been satisfied. See *Williams v. Gayle*, MSS. opinion.

2d. The trust creditors have a preference to the entire fund in litigation, joint and individual, over the judgment creditors, to the extent of five thousand, the sum named in the deed.

3d. In applying the trust fund to the payment of the debts to Toof, Phillips & Co., the contract intends that the crops of cotton should be first applied; next in order and in aid of the crops, the plantation implements, mules or other effects jointly bound, and lastly the individual property of John H. Estill.

But if the crops and other partnership effects have actually realized and paid to the trust creditors the \$5,000 and interest limited in the deed, then that security has been satisfied, as to any individual property embraced in it, and the judgment creditors, by reason of their lien, have a preference over the trust creditors to the extent of the value of such separate property. See *Haynes et al. v. Hough*, MSS. opinion.

Recurring to the report of the master, it is shown that Toof, Phillips & Co. advanced to Estill and Ferris, \$6,705, and to Estill & Son, \$7,961.32. The total of advances being \$14,666 32. Deducting the credits from cotton and cash, and there is still due \$5,274; of this balance, \$2,055 from Estill & Ferris, and \$3,219 from Estill & Son. To make good these sums, Toof, Phillips & Co. had a preference to the whole amount received from the cotton and other joint property. The amount thus realized was a



---

Syllabus.

---

little over \$9,000, nearly four thousand dollars in excess of the sum agreed to be conveyed. But the deed of trust became thereby satisfied, so as to turn loose the 20 mules owned by John H. Estill, and upon them or their money value, the judgment creditors had a preference.

So much of the decree of the chancery court is erroneous, as allows to Toof, Phillips & Co., \$3,500, the amount produced by the sale of the 40 mules, or so many of them as survived. One-half of that sum ought to have been appropriated to the judgment of the appellants.

That portion of the decree is reversed, and decree here in accordance with this opinion.

---

W. K. THOMASON et al. v. MARY A. NEELEY.

1. FRAUDULENT CONVEYANCES — EFFECT THEREOF. — The statute condemns a fraudulent conveyance to be utterly null and void as to creditors, and they have the same rights against the property embraced in the conveyance as though it never had been made; in effect, the debtor still owns the property, and the creditor may pursue his process for satisfaction as though the title were unembarrassed by the fraudulent deed.
2. CHANCERY PRACTICE — CROSS BILL — ITS OFFICE. — A cross bill is a proceeding to procure a complete determination of a matter already in litigation. The party as against the complainant in the original bill, is not obliged to show any ground of equity to support the jurisdiction of the court. Story Eq. Pl., § 339. The appearance of a defendant to a cross bill is enforced in the same manner as to the original bill. 2 Daniels' Ch. Pr., p. 1652. The dismissal of the original bill, as a general rule, would carry with it the cross bill. Ladner et al., v. Ogden et al., 81 Miss., 340.
3. SAME — WAIVER THEREOF. — If the defendant has neglected for several terms to take out process or prepare the case made in the cross bill, the same may be considered as abandoned, at the final hearing for such laches. It is appropriate as against a judgment creditor, who sues in equity to set aside a fraudulent conveyance, to claim in a cross bill that the homestead of the defendant debtor may be assigned by metes and bounds.

---

Briefs.

---

APPEAL from the Chancery Court of Chickasaw County. Hon. AUSTIN POLLARD, Chancellor.

This was a bill to set aside a fraudulent conveyance by one who was not a debtor at the time of making the conveyance.

The party was suing for damages, but had not recovered a judgment when the deed was executed.

The errors complained of are:

1. The court erred in rendering a decree setting aside the transfer of the real estate as fraudulent.
2. The court erred in adjudging the complainant a creditor.
3. The court erred in decreeing the property which was exempt from seizure and sale under execution at the time of making the deed, which was declared fraudulent, was the property of the creditors of Thomason.
4. The court erred in not requiring an answer to be made to the cross bill of defendant.

*Tucker, Harper & Buchanan*, for appellants, insist:

1. That as the answer of the defendant is made a cross bill, and there being no answer thereto, the decree cannot be sustained.
2. That the decree decides the conveyance, made by appellant, fraudulent as to appellee and others who were suing for unliquidated damages at the time the deed was executed, and having no evidence of debt at the time, are not creditors in the sense in which it is used in the statute.

*Houston & Reynolds*, for appellee, contended:

1. That the deed is fraudulent on its face, because it ties up the sale of the property indefinitely, and reserves to the grantor the enjoyment of it until that indefinite period. *Arthur v. Com. B. of Vicksburg*, 9 S. & M., 394; *Farmers' Bank v. Douglas*, 11 S. & M., 469.
2. That appellee was a creditor, within the meaning of the statute, at the time the deed was executed, leaving a suit pending for damages for a tort, and cited *Green v. Wright*, 6 Grattan, 154; *Hall v. Sands*, 52 Maine, 355; *Pennington v. Clifton*, 11 Ind.,

---

Opinion of the court.

---

162; Rogers v. Evans, 3 Ind., 574; Findey v. Cooley, 1 Blackford, 262; Doyle v. Sleeper, 1 Dana (Ky.), 532; O'Daniel v. Crawford, 4 Dev., 197; Livermore v. Boutelle, 11 Gray, 217; 5 Sneed, 531; 2 Heisk., 343; Bump on Fraudl. Con., 485.

3. That although creditors cannot assail a conveyance of exempt property, however fraudulent it may be, still such conveyances are good and valid as between grantor and grantee, and will not be set aside at the instance of the grantor.

4. That the cross bill should have been dismissed, as it was without equity. It did not require an answer, as it prayed for relief only in the event of a contingency, and that contingency could not happen until the court pronounced its decree in the case as made by the original bill. That the cross bill put in issue no facts which were not presented by the bill and answer, and it was a matter of defense if available at all, and not of relief. That the cross bill was filed in 1867. The final decree was rendered in 1873. That eighteen terms of the court passed from the filing of the cross bill to the final termination of the cause, and no decree, *pro confesso* or answer is asked for; hence the cross bill was waived by both parties.

SIMRALL, J., delivered the opinion of the court.

Mary A. Neeley, who purchased the land in controversy at sheriff's sale, under executions issued upon judgments, recovered against W. K. Thomason, exhibited her bill in chancery against Thomason and Hughes, to vacate and set aside a deed executed by Thomason, conveying the premises in trust to Sadler and Drake, with power to sell to pay the debts therein mentioned; and also to annul and cancel the deed made by those trustees to Hughes, who purchased at their sale.

The ground of assailing these conveyances is, that they were contrived and made to hinder, delay and defraud the complainant and others, creditors of Thomason, of their debts, suits and damages.

---

Opinion of the court.

---

It is not complained so much that the decree is erroneous, declaring the nullity of these deeds, as that there was error in not hearing Thomason's cross bill and decreeing upon it. The cross bill claims that if the court should decree the trust deed and the conveyance to Hughes to be void, as to the complaint, then it should assign and designate to Thomason two hundred and forty acres of the land as his homestead. We have held, in several cases, analogous in features to this, that as the statute condemned a fraudulent conveyance to be null and void as to the creditor, he has precisely the same extent of right against the property embraced in it as though it never had been made. In effect, the debtor owns the property with the same extent of interest as though he never had conveyed, and the creditor has a lien under his judgment, quite as controlling over the title as though the fraudulent deed had never been executed. The creditor may treat his debtor as owner of the property, and may pursue his process for satisfaction as if the title were unembarrassed by the fraudulent deed. The parties standing in this relation to the property, the creditor can only sell under his execution so much of the property as is not exempt from seizure and sale.

This right of Thomason to have been assured in his homestead exemption, by excepting it out of the operation of the sheriff's deed to Mrs. Neeley, and designating and marking its boundaries, was a subject entirely appropriate to be presented in a cross bill.

Since a cross bill is a proceeding to procure a complete determination of a matter already in litigation, the party is not as against the complainant in the original bill, obliged to show any ground of equity to support the jurisdiction of the court. Story Eq. Pl., § 339. *Burgess v. Wheate*, 1 Eden, 190.

The complainant seeks to establish her title to the entire tract of land, and to vacate the claims of the defendants under certain deeds. But Thomason claims if these deeds shall be cancelled as nullities, nevertheless he has an interest in the land, his homestead exemption, which he prays may be protected. This is mat-

---

Opinion of the court.

---

ter germain to and growing out of the subject of the original bill, and therefore fit to be preferred in a cross bill. *Daniel v. Morrison*, 6 Dana, 186. *Rutland v. Paige*, 24 Vermont, 181.

At the same term, or shortly after the original bill had been dismissed, Thomason moved that the case be heard on the cross bill. The response of the court to that motion was a dismissal of the cross bill.

If that order was predicated on the idea that the cross bill did not contain a subject connected with the matter of the original bill proper to be litigated in that form, as an auxiliary and dependency of the original suit, it would, as we have seen, have been a misconception of the rule.

We do not consider the action of the court as resting upon that ground, or as at all passing upon the merits of the cross bill.

The answer and cross bill were filed on the — day of —, 1867. The decree dismissing the original bill was rendered April 22, 1872, nearly five years after the filing of the answer and cross bill. In the mean time no steps were taken under the cross bill. No subpoena was taken out against the complainant; indeed, no defendant is made to it, nor is process prayed against any person. These were necessary in order to make and bring before the court the necessary parties. The appearance of a defendant to a cross bill is enforced in the same manner as to the original bill. 2 *Daniel Ch. Pr.*, p. 1652. The statute of February 15, 1838, changed the practice as it had prevailed in chancery courts in two particulars. First, the defendant might introduce new matter material to his defense, and call upon the complainant to answer the same on oath, which the complainant must respond to, or the defendant may make his answer a cross bill against the complainant or against a codefendant or defendants, or all of them, "upon which no subpoena shall issue, unless new parties are made," but the complainant or codefendants shall answer thereto \* \* and on failure to answer, may be taken for confessed. Under this statute the answer might perform the office of a bill of discovery

## Syllabus.

simply, or that of a cross bill. Hut. Code, p. 770, § 1. The revision of 1857, p. 548, art. 51, altered the statute of 1838, so as to require process against the defendants to the cross bill, and like proceedings thereon as in other bills or cross bills. This article 51 is brought forward into the Code of 1871, § 1080. The existing statute allows the answer to be made a cross bill against the complainant and codefendants or all of them, but returns to the practice which always prevailed in the chancery court, that the defendants there-to must be served with the same process used to compel the appearance of defendants to the original bill.

The cross bill is auxiliary and a dependent of the original bill in aid of the defense thereto, so that the final determination may be complete as to the subject matter. It would follow that, ordinarily, the plaintiff in that bill should be prepared for hearing when the cause is heard on the original bill, and that a dismissal of the original bill would carry with it the cross bill. On that point see *Ladner et al. v. Ogden et al.*, 31 Miss. Rep., 340, 344. The long delay and laches of Thomason in respect of his cross bill, justified the court in concluding that he had abandoned it, and that he had elected to rely exclusively on his answer. Whether the cross bill went along with the dismissal of the original bill or not, in that view of negligence and laches, the court did not err in dismissing it.

Decree affirmed.

---

A. E. THOMPSON v. N. O., J. & G. N. R. R. Co.

1. RAILROADS — LIABILITY FOR DAMAGES. — T. went aboard the cars, paid fare to Bogulchitto. The train did not stop, but ran past two miles to a water tank. T. demanded that the train should return. The conductor was courteous and polite, and submitted the option to T. to leave the train at the tank or ride to the next station and return to Bogulchitto free of charge. T. accepted the latter alternative; *held*, that this was a compulsory choice. The train upon which he returned ran beyond the station and landed him about 150 yards beyond, and he voluntarily

---

Brief for plaintiff.

---

jumped off, without injury. On the trial, the counsel for defendants demurred to the testimony, and the court sustained the demurrer; *held*, that this was error.

2. **SAME — CASE IN JUDGMENT.**—Although no bodily injury, mental suffering, insult, oppression, or pecuniary loss be shown, and though these concomitants of damages are disclaimed, yet if the railroad company failed in its obligation by neglecting to deliver its passenger at B., the passenger acquired a technical right of recovery, but the rule of punitive damages does not apply. Hence, although the damages are only nominal, nevertheless, the cause of action should be sustained.

ERROR to the Circuit Court of Lincoln county. Hon. J. M. SMILEY, Judge.

The facts in this case are sufficiently set forth in the opinion of the court.

*Cassidy & Stockdale*, for plaintiff in error:

The question presented by the demurrer is, do the facts admitted by the demurrer, not only as to what they prove, but what they tend to prove, also, justify the plaintiff in recovering or not, not the amount of the recovery, but the right to recover under the law? *M. & O. R. R. v. McArthur*, 43 Miss., 184.

Do the facts show a cause of action? Wherever the action is against a common carrier for breach of duty, the courts are inclined to consider it as founded in tort, unless a contract be very clearly shown by the declaration. *Heirn v. McCaughan*, 3 George, 39; *N. O., J. & G. N. R. R. v. Hurst*, 36 Miss., 668.

Railroad companies must carry passengers to their respective places of destination, and set them down safely, if human care and foresight can do it. *M. & C. R. R. v. Whitfield*, 44 Miss., 485.

*Harris & George*, for defendants in error:

We take the case of *M. & O. R. R. v. McArthur*, 43 Miss., 180, as a perfectly accurate exposition of the law governing demurrers to evidence.

Here, however, the evidence is direct, simple and free from ambiguity and the plaintiff voluntarily joined in the demurrer. If it be true that railroad companies should be held to a strict ac-

---

Opinion of the court.

---

count for the safe transportation of passengers, it is equally true that the courts of the country should not be made to subserve the purposes of mere speculative litigation. Cited Redfield on Railways, 252. N. O., J. & G. N. R. R. Co. v. Hurst, 36 Miss., 668.

*Chrisman & Thompson*, on the same side filed a brief

TARBELL, J., delivered the opinion of the court.

About November 16, 1870, Thompson went on board the cars of N. O., J. & G. N. R. R. Co., and paid his fare to Boguichitto. The train, however, did not stop at the station, but ran past about two miles, stopping at a water tank. Thompson demanded of the conductor that the train should be backed to the station at Boguichitto, but the conductor said the train could not be backed. He was courteous and polite; expressed regrets; said the blame attached to the engineer, who had been contrary all day; and submitted the option to Thompson to ride to the next station, with transportation back by the first train free of charge, or of leaving the train at the tank, where it then was. The offer of a free ride Thompson accepted. The train on which he returned ran beyond the station at Boguichitto, and landed him about 150 yards therefrom, the train slackening its speed, and he voluntarily jumped off while it was in motion, without injury. Thompson had with him a roll of bagging, on which he paid no freight. The mail trains were not in the habit of stopping at Boguichitto, but sometimes did so. Thompson got on board the train at Brookhaven about dusk, and was landed at Boguichitto about midnight, being delayed some two or three hours. Upon this state of facts, Thompson instituted this action against the company to recover damages. He testified on the trial that he "could not say that he was pecuniarily damaged one cent." No complaint is made of the conductors or other officers of the road, that they were guilty of any acts of rudeness, discourtesy or oppression; but it appears they were affable, and offered apologies for carrying Thompson by the station to which he was destined.



---

Opinion of the court.

---

There was a demurrer to the evidence of the plaintiff, in which the plaintiff joined.

The court sustained the demurrer and dismissed the plaintiff's suit. Thereupon Thompson prosecuted a writ of error.

It is insisted in behalf of the plaintiff in error, that upon the facts, the right of action is absolute and complete. And counsel press the distinction between this right and the amount of damages which may be assessed by the jury. On the other hand, it is urged that this is, on its face, a speculative prosecution, and ought not to be sustained by the courts.

In *Heirn v. McCaughan*, 32 Miss., 17, the suit was by the husband and wife, against a common carrier by water, to recover damages for the neglect of the carrier's steamer to call for passengers at Pascagoula. The wife was in delicate health. They were exposed on the pier-head at Pascagoula from sundown at night until sunrise in the morning, during exceedingly uncomfortable and perilous weather. So intense was the cold, that McCaughan, to protect his wife, was compelled to surrender to her the use of his coat, and to remain through the night in his shirt sleeves.

Thompson, in the case at bar, makes no complaint of mental or bodily suffering, nor of danger from exposure to the weather or otherwise.

The case of the N. O., J. and G. N. R. R. Co. v. *Hurst*, 36 Miss., 660, was based on insult and compulsion on the part of the conductor. Nothing of the kind appears in the case at bar.

*M. & O. R. R. Co. v. McArthur*, 43 Miss., 180, was like the one at bar to the extent only of a demurrer to the evidence. The recovery in the case cited rested on the fact, that the plaintiff was carried five miles beyond the station at which he ought to have been landed, walking back to his proper station in the rain, arriving there between 12 and 1 o'clock at night, and that he was subject to chronic rheumatism. The case is, therefore, unlike the one at bar.

Between this case and that of the *M & C. R. R. Co. v. Whit-*

---

Opinion of the court.

---

field, 44 Miss., 466, there is this difference, that the train ran several hundred yards past the station where Mr. Whitfield should have been deposited, and he was compelled to get out at a place, wet and slippery, and in alighting without assistance, fell and seriously injured his knees.

And in *S. R. Co. v. Kendrick and wife*, 40 Miss., 374, the action was to recover damages against the company for carrying Mrs. Kendrick a mile or two beyond her destination, setting her down in the night at a lonely, solitary point of the road, whence, in the care of two strange laborers, she had to walk over dangerous bridges and through woods, back to her home. The conductor offered to take her on until he should meet the return train, when he would pass her home free of charge, but this she declined. It will be observed of these cases, that the point specially litigated is as to the recovery of exemplary damages, while, in the case at bar, the question is, was the right of action, without reference to damages, complete, when the train failed to set the party down at Boguichitto, and the conductor gave him his option to get down at the tank or be taken to the next station and returned free of charge? In choosing to accept the alternative of a free ride to the next station and back to Boguichitto, did he thereby waive or compromise his right of action?

The court say in *S. R. R. Co. v. Kendrick et ux., supra*, that "by the fifth instruction the court instructed the jury, that in actions of tort against common carriers, special damage need not be proved. This was improper, because it was indefinite, and calculated to mislead the jury. If it be understood as holding, that when there appears, by the evidence, to be negligence in the carrier to the wrong of the plaintiff, in such a case the plaintiff is entitled to recover nominal damages without proof of special damage; to that extent the rule was correct. But if it be taken to hold, that when the carrier has been guilty of negligence, the plaintiff may recover special or exemplary damages without any evidence tending to show circumstances of special injury or wrong, it was error."

---

Syllabus.

---

And this is undoubtedly the correct rule, and by which the case at bar must be determined. There is no bodily injury, mental suffering, insult, oppression or pecuniary loss shown, indeed, these concomitants of damage are disclaimed. Yet, the railroad company failed in its obligations, when the train neglected to deliver its passenger at Boguichitto, and the option to him to get down at the tank or ride to the next station and return, was necessarily a compulsory choice. Upon the evidence, the plaintiff acquired a technical right of recovery, but the rule as to punitive damages does not apply. Hence, although the damages are only nominal, nevertheless, the cause of action ought to have been sustained, and a writ of inquiry awarded, to be executed under the appropriate directions of the court in such a case, as to which, *vide*, 2 Red. L. of Railways, 220 et seq.; S. & R., 646 et seq.; Sedgwick, 90, 128 note, 413 note, 665 note.

Ordered accordingly. Code, § 413.

---

JOHN F. SWAIN v. WM. A. ALCORN.

1. MOTION AGAINST A SHERIFF—BOND OF INDEMNITY—REPLEVIN.—The effect of the law (Rev. Code of 1871, §§ 844 and 845) is to transfer to the obligors in the bond of indemnity the responsibility which, at common law, rested upon the sheriff for an illegal seizure of property not liable to the writ. In cases where, at common law, the owner of property so seized could recover damages against the sheriff, the suit upon the bond is substituted for that in the name of the obligee, and for his use. And this substitution is a bar to any action against the sheriff, unless the obligors on the bond shall be or become insolvent, or the levy be otherwise invalid. It is the duty of the sheriff, after taking the bond of indemnity, to proceed to sell the property, unless it be taken out of his hands by legal process. The claimant may litigate his right to the property in an action of replevin, and, if he fails, he is precluded from any action against the sheriff. Where a motion is made against the sheriff for a failure to make the money on a *fi. fa.*, and he answers that he levied on the only property liable to be taken, and that that had been taken out of his hands by paramount legal process, that will be a sufficient answer.

---

Brief for plaintiff.

---

ERROR to the Circuit Court of Tallahatchie County. Hon. E. S. FISHER, Judge.

Plaintiff in error recovered a judgment in the justice's court against one Thomas Minter, had execution issued and placed in the hands of defendant in error, as sheriff, with directions to levy the same on certain personal property in the possession of Minter, which was accordingly done. Doubts arose as to the right of the property, and defendant took an indemnifying bond. Bellary claimed the property, and instituted an action of replevin against the sheriff (this defendant) for its recovery, and took the property into possession. The sheriff returned the execution, indorsing the facts. A motion was made against defendant in error; the motion was sustained in the justice's court, and judgment rendered for the debt, interest, cost and damages; the sheriff (defendant), appealed to the circuit court, where the same was tried, and a judgment rendered against plaintiff in error; and the case comes to this court on a writ of error.

*Fitzgerald & Marshall*, for plaintiff in error :

The sheriff having taken the bond from the plaintiff in execution, indemnifying him for the seizure and sale of the property, was bound to use all the means in his power to hold the property, sell the same, and apply the proceeds to the execution.

The late high court, in the case of *Moore et al. v. Allen et al.*, 3 Cushman, 375, say : "The object in allowing the plaintiff in execution, his attorney or agents, to execute a bond of indemnity to the sheriff in any case, is to transfer the liability to which he subjected himself by the seizure and sale of the property under the execution, to the person executing the bond. The statute which authorizes the officer in demanding an indemnifying bond, is Code of 1871, §§ 844-45. It throws all the liability and responsibility of the officer upon the obligors in the bond.

The sheriff receiving the bond of indemnity is bound to sell. *Stone v. Pointer*, 5 Munf., 290.

---

Opinion of the court.

---

Replevin is likened to trover. See *Barrage v. Melson et ux*, 44 Miss., 245 ; 4 S. & M., 153 ; 7 How. (Miss.), 47.

*W. S. Eckford*, for defendant in error :

The intent of the act is to protect the sheriff from any damages in the levy or sale of the property, in cases where he may have a doubt as to the right of the property, to require the plaintiff in execution to assume such risk in demanding of him a bond of indemnity. Rev. Code 1871, § 845.

The policy of the law is to relieve the sheriff of the responsibility, and to lessen his official burden.

Our statute giving the action of replevin is very broad, and certainly is not cut off by the execution of a bond of indemnity by the plaintiff in execution. *Yarborough v. Harper*, 3 Cush., 112 ; *Ford v. Dyer*, 4 ib., 243 ; *Hopkins v. Drake*, 44 Miss., 619.

The second ground for the motion was removed by the amended return of the sheriff, made in the circuit court, showing that the defendant in execution had no other property subject to levy.

SIMRALL, J., delivered the opinion of the court :

The only point raised in this case is, whether a sheriff, who has levied an execution upon personal property, and has been deprived of the possession by writ of replevin at the suit of a claimant, is liable for the debt and damages on the motion of the judgment creditor. It is contended by counsel for the plaintiff in error, that inasmuch as the sheriff had demanded and received a bond of indemnity, he is so liable.

In proceeding to execute the writ of *fieri facias*, the sheriff often encounters doubts and embarrassments touching the title to the property seized, suggested by his own information, or arising from a claim set up by a third person. For his own safety, it becomes important that it should be determined in advance of a sale, whether the property taken is subject to the writ, or that the officer should be indemnified. At the common law, the sheriff may take an indemnity from the plaintiff. It was intimated in *Cooper*,

---

Opinion of the court.

---

assignee, etc., v. Chitty et al., 1 Burr., 37, that "possibly the court of law might interfere, if the sheriff was reasonably doubtful about the property." He could undoubtedly, by filing a bill in chancery against the parties concerned in interest, oblige them to interplead, in order to ascertain to whom the property belongs. Ibid. Although the sheriff took an indemnity from the plaintiff, that did not exempt him from suit, as a trespasser, by the true owner of the property. It, in no degree exempted him from responsibility to such owner. The statutes of this state were framed with the idea of giving the sheriff complete protection in taking under legal process personal property, in cases of doubt as to the ownership, by giving to the bond of indemnity a broader effect than it had at the common law. The effect of §§ 844, 845 (Code of 1871), is to transfer to the obligors of the bond the entire responsibility which rested at the common law upon the sheriff, for an illegal seizure of property not liable to the writ, so that whenever the owner of the property at the common law could recover damages against the sheriff, the suit upon the bond is substituted for that, in the name of the obligee for his use. This substituted remedy is in lieu of the common law action against the sheriff, and in absolute bar of it, "unless the obligors on the bond shall be or become insolvent, or the bond be otherwise invalid." § 845.

After such indemnifying bond has been given, it is the duty of the sheriff to proceed to a sale unless he has been deprived of the possession of the property by some legal proceeding.

Because the person who may claim to, and in reality is the owner, is protected by the indemnifying bond, and may sue upon it; that does not cut him off from the remedy provided in §§ 859, et sequitur; of propounding his claim, executing bond and trying the "right of property;" or if he prefers it, of bringing the original action of replevin (Hopkins v. Drake, 44 Miss., 621; Yarborough v. Harper, 25 Miss., 112; Ford v. Dyer, 26 Miss., 243), against the sheriff. If in either of these modes, a

---

Opinion of the court.

---

claimant litigates his right to the property and fails, he would be thereby concluded from suing on the bond of indemnity.

He may let the sale go on and sue upon the bond of indemnity and recover the value and incidental damages, for withholding the possession, or he may make the claim and try his right under the statute or in the action of replevin.

It is argued by counsel for the plaintiff in error, that if the sheriff has been indemnified, he is bound (if a claimant sues in replevin), to give the bond, which entitles him, as defendant, to retain the property, and then he must proceed and make sale under the execution, and if he does not, he is liable to the motion under the statute, for failing to return the process. This position is founded in a misconception of the statutes, and is untenable.

If the claim is preferred under the statute, the sheriff is required at once to desist and to return the affidavit and bond of the claimant with the writ, in order that the issue may be made up and trial had. If the property is taken by the writ of replevin, it is not made his duty to give bond and keep the possession. He may safely rely upon the plaintiff's bond as ample security for the property, and await the judicial determination as to the ownership. It is the "privilege" of the defendant to give the bond if he prefers and elects to do so, § 183, Code of 1871, and not compulsory. If this statute is complied with, his rights are amply secured by the bond of the plaintiff.

The manifest policy of our law is, that any person claiming to be owner, may test his right and if it is propounded in either of the modes indicated, the judgment creditor must wait until it be judicially determined to whom the property belongs. The law does not intend that one man's property shall be sold to pay another's debt. The return of the sheriff, in this case, set forth as reasons why he did not proceed to complete execution by a sale, that the property had been taken out of his possession by the writ of replevin at the suit of George W. Bellamy, trustee, and that defendant, Minter, had no other property.

---

Opinion of the court.

---

The bailee is excused, if whilst the bailment continues, the property is taken out of his possession by process of law. This obedience to legal authority exonerates him from blame. Besides, he has lost the possession compulsorily. In *Edson v. Weston*, 7 Cow., 280, the defense was sustained that the horse and harness in question had been taken from the defendant, to whom they had been bailed by the sheriff under execution, etc. See also *Irion v. Hume et al.*, decided at this term.

If the view urged by the plaintiff in error be sound, viz, that the sheriff was bound to give bond, retain the property, and make the sale, then he would be left in the predicament of an undecided controversy with Bellamy as to the ownership. If Bellamy succeeded in establishing his right, then the sheriff as defendant in replevin would have been compelled to respond for the value of the property and damages, and would have no other recourse upon the plaintiff than a suit upon the bond of indemnity.

We think that the taking of the mules from the sheriff under the writ of replevin, arrested the further action until that suit was decided. If the plaintiff failed, the mules would be restored to the sheriff, or their value, and damages, to be applied towards the satisfaction of the creditor's payment. If the plaintiff succeeded, then the sheriff was relieved from all responsibility, since he had lost the property by paramount authority.

The motion for a failure to return an execution contemplated by § 282 of the Code of 1871, applies to a default of the sheriff, arising from his own wilfulness or negligence. and not to a case where he has been hindered and arrested in the execution of the process, by legal authority as by injunction, by a claim of property according to the statute or the writ of replevin.

The judgment of the circuit court is in accordance with these views, and it is affirmed.



## Statement of the case.

## R. F. BAY v. J. A. C. SHRADER.

1. CHANCERY PRACTICE—CROSS BILL—ITS FUNCTIONS.—If the defendant, in his answer, relies for any cause, upon the voidness of the instrument relied upon by the complainant for recovery, he cannot have affirmative relief of cancellation, unless he makes his answer a cross bill. But if it be shown that such instrument, from whatever cause, cannot support a right of recovery, the court should refuse a decree to enforce the instrument and dismiss the bill. The effect of such decree on final hearing is conclusive upon the parties, on all the matters properly put in issue.
2. PROMISSORY NOTES—ALTERATIONS—EFFECT THEREOF.—Words written on the back of a note are no part of the body thereof *prima facie*, but are presumed to be done after the note is completed. The test of the materiality of any indorsement or memorandum on the back or foot of a note is the time and the intent of it. If made before or at the time of the execution, it forms a part of it and may control the obligation in some important particulars. But being disconnected from the body of the instrument to which the maker's name is signed, it forms no original part of it, until shown to have been upon it when executed.
3. SAME—CASE IN JUDGMENT.—S. gave B. two promissory notes for \$500 each, secured by an agricultural mortgage. At the time of the execution, B. indorsed on one of the notes \$250 to be paid on the 1st of January, 1872, and \$250 to be paid on the 1st of January, 1873. These indorsements were subsequently erased : *Held*, that the note so erased could not be the foundation of a suit to recover.

APPEAL from the Chancery Court of Warren County. Hon. EDWIN HILL, Chancellor.

The complainant's bill alleges the execution and delivery by appellee to appellant two notes for \$500 due January 1, 1872, and January 1, 1873, and of a mortgage on crop and stock to secure the same, in Washington county, Mississippi, all executed on the 7th of June, 1871; The acknowledgment of this mortgage on the 18th of September, 1871, the bill further alleges that the first note is overdue and unpaid, and that appellee is removing his crops out of the state, and that complainant's security is inadequate, etc., and then prays for sequestration. The cotton is seized and bonded by complainant.

---

Brief for appellant.

---

The answer admits the execution and delivery of the notes and mortgage and the nonpayment as alleged, but denies the existence of any debt or lien under the contract, because of the failure of the consideration owing to the nonfulfillment of complainant's part of the contract in not delivering possession of the property at the time stipulated. The defendant alleges, at the time of the execution of said notes and mortgage, and before the agreement was consummated, that the original engagement was changed by indorsing on the back of the first note that the defendant was to pay \$250 on the 1st of January, 1872, and \$250 on the 1st of January, 1873. Defendant alleges that complainant wilfully and fraudulently erased and effaced this writing so as to make it appear that the \$500 was to be paid and due on the 1st of January, 1872. Defendant further alleges credit of \$82 on the first note and an offset of \$663, etc. Defendant prays that the notes and mortgage be cancelled and cotton restored or offset allowed, and for general relief, etc.

There was no testimony offered by complainant. The evidence introduced by defendant established the facts set out in his answer.

Complainants set the cause for final hearing, but afterwards moved to remand the case to rules for further testimony. The motion was sustained by affidavits, etc. This motion was overruled and final decree rendered, ordering the cancelling of the notes and mortgage and return of the property to defendant.

From this decree an appeal was taken and the following errors assigned :

1. The court erred in refusing to remand the cause to the rules for taking further proof, on motion of appellant.
2. The court erred in making the final decree in the cause that it did.

*Buck & Clark*, for appellant, contended :

1. That there was no fraud in the alleged alteration, nor was the identity of the note destroyed by it.

---

Opinion of the court.

---

2. That the mutilated indorsement was no material part of the instrument, and hence its erasure did not affect the validity of the instrument. 2 Parsons on Notes & Bills, p. 582; Moyer v. Hurd, 30 Miss., 110.

3. That the decree cannot be sustained, because the defendants' answer prays for specific relief, and is not made a cross bill. Arnold v. Miller, 26 Miss., 152; Millsaps v. Pfeiffer *et al.*, 44 Miss., 805.

*Catchings & Ingersoll*, for appellee, insisted :

1. That the indorsement made on the note at the time of its execution, changing the time of its payment and the amount, was a material part of the note, and the erasure of this indorsement vitiated the note and discharged the debtor. Henderson v. Wilson, 6 How. (Miss.), 65; Bruce v. Westcott, 3 Barb., 374; Oakley v. Wilcox, 3 How. (Miss.), 330; Woodward v. Bank of America, 19 Johns., 391.

2. That if the court erred in granting affirmative relief to defendant without his answer being made a cross bill, this court should render such a decree as the court below ought to have rendered.

SIMRALL, J., delivered the opinion of the court.

To the bill brought by R. F. Bay, to enforce an agricultural mortgage, executed to him by Shrader, the latter set up three defenses :

First. A material alteration of the note sought to be collected, by reason whereof it became void.

Second. That Bay did not deliver all the houses and tenements on the leasehold premises, according to his contract, and in consequence of his failure the defendant did not realize as much crop as he would had he got the houses.

Third. The note of Bay, purchased from Mitchell, is set up, by way of counterclaim as offset against his demand.

The Chancellor concurring that the first defense had been established, decreed that the note and mortgage be canceled.

---

Opinion of the court.

---

We have recently held, that if the defendant, in his answer relies for any cause, upon the voidness of the instrument relied upon by the complainant for recovery, he cannot have affirmative relief of cancellation, unless he makes his answer a cross bill. But if it be shown that such instrument, from whatever cause, cannot support a right of recovery, the chancery court can do no more, in such state of the pleadings, than to refuse a decree, enforcing the instrument and dismissing the bill. The effect of such decree, dismissing the bill, on final hearing, on the merits, is conclusive upon the parties, on all the matters properly put in issue. If the chancery court was right, therefore, in its conclusion, that the promissory note had been altered by the complainant, or with his privity, it erred in the form of the decree pronounced.

The answer and the proof leave it in uncertainty and doubt, as to the time of pleading the indorsement on the back of the note, and of its erasure. The legal consequence of the alteration of a memorandum or indorsement on the back of the paper depends very much on its character. It is laid down by Parsons' Bills and Notes, vol. 2, 544, that words written on the back of the note are no part of the body thereof, *prima facie*, but are presumed to be done after the note is completed. And hence an erasure need not be explained in pursuing a remedy solely on the body of the note. The test of the materiality of such memoranda or indorsement on the back of the instrument is, the time and the intent and purpose of it. If made before or at the time of the execution of the instrument, it may be parcel of it, and may control the obligation in some important particular.

In the early case of Brooke v. Smith, Moor, 679, which was debt upon an obligation to save harmless certain lands from all incumbrances made by the obligor, upon the back, was a memorandum, that the condition should not extend, to an extent of a statute acknowledged by the obligor to a certain person. Here the memorandum was parcel of the condition — being a written

---

Opinion of the court.

---

explanation of the intent of the parties—and limiting the operation of the condition. There are many cases to the same point. *Steadman v. Purchase*, 6 D. & E., 737; *Burgh v. Preston*, 8 D. & E., 483; *Jones v. Fales*, 4 Mass., 245; *Hartley v. Wilkinson*, 4 S. & M., 25; *Leeds v. Lancashire*, 2 Com., p. 205; *Fletcher v. Blodgett*, 16 Vermont, 26; *Springfield Bank v. Merrick*, 14 Mass., 322. If such memoranda are at the foot or on the back of the note or other instrument, when executed, they constitute a part of the contract. But being disconnected from the body of the instrument to which the maker's name is signed, it forms no original part of it, until shown to have been upon it when executed.

In this case the words written on the back of the note and signed by Bay, which have been erased, by lines drawn across them, are to the effect that two hundred and fifty dollars are to be paid January 1, 1872, and the like sum January 1, 1873. If that indorsement was made before the note was signed, it would operate, to divide the note into two payments, and would change the body of the paper, which made the entire \$500 fall due January 1st, 1872.

Shrader, in his testimony, gives this account: "After arriving at the magistrate's office, Bay proposed to write out two notes for \$500 each, so that the notes would correspond with our written agreement, then he proposed to indorse on the back of the notes that he would wait for the \$250 until the first of January, 1873, which he did." The agreement referred to is dated the 7th of June, 1871, by which Bay sold out to Shrader his interest in the lease of the Richland plantation, for the time and on the conditions therein specified, also the use of his teams, wagons, etc., for \$500, payable January 1st, 1872, and \$500 January 1st, 1873. The evidence is that the two notes of \$500 each, were given at the same time with the mortgage, in August, 1871, but were dated so as to correspond with the agreement of purchase, June 7th, 1871. There was no stipulation in this agreement for mort-

---

Opinion of the court.

---

gage security. But doubt was expressed in it, whether Bay could hold for the five years, and provision was made, that if the lease failed, deduction should be made from the last instalment. Bay was not examined as a witness, and the only evidence about the alteration of the contract comes from Shrader himself. There was a pending dispute between Shrader and Bay, because of the refusal of the latter to surrender possession of some houses, and there is testimony that serious damage resulted to Shrader from that cause. The execution of the mortgage and notes in August, seems to have been intended by the parties, to be a settlement of their differences, Shrader to secure his debt, and Bay to divide the first note into equal installments, by indorsing a writing on the back of it to that effect. The fair reading of Shrader's testimony is that such was the understanding, and that the indorsement was made before the execution, and constituted a parcel of the contract. The fact that Bay did not testify and deny this explanation of the matter by the other party, would warrant the deduction that he acquiesced in it.

The most of the margin of the paper upon which the indorsement was written has been torn off, but the name of Bay still appears upon it, is signed to it, with lines of erasure drawn across.

We do not think this paper can be made the foundation of a right to recover, nor do we think, without a cross bill, that the defendant could ask for positive affirmative relief.

It has been more than once held in this court, that if the defendant seeks more than a defeat of the relief sought by the complainant on the mortgage, or other instruments, the foundation of his claim — such as a cancellation of it or them — so as to set them entirely aside, and thereby prevent the possibility of future annoyance therefrom, he can only obtain such relief by a cross bill.

So much of the decree, therefore, as directs and orders that the "said mortgage be canceled as to the said cotton seized," "and that the said note be canceled," is reversed and set aside; but

## Statement of case.

that the said decree, in each and every other particular, is affirmed.

## HENRY WRIGHT v. THE STATE OF MISSISSIPPI.

1. CRIMINAL LAW—PRACTICE—EVIDENCE.—W. was indicted for the murder of K. Prior to the finding of the indictment, he was tried before a justice of the peace, before whom he made a voluntary statement, which was taken down in writing. On the trial in the circuit court, M., a witness for the state, was permitted to testify to what the accused said in his voluntary statement before the committing magistrate, in opposition to objections from defendant's counsel. *Held*, that the admission of the testimony was error.
2. SAME—EVIDENCE—ADMISSIBILITY.—As a general rule, the law requires the production of the best evidence of which the nature of the case in its nature is susceptible. Not the greatest amount of evidence of any fact, but its design is to prevent the introduction of any which, from the case, supposes that better evidence is in possession of the party. As the statute requires that the justice of the peace shall reduce to writing the voluntary confession of the accused, and shall certify and send up the same to the next term of the circuit court of the proper county, the law conclusively presumes that he performed his whole duty. If it be shown that the examination was not reduced to writing, or if the written examination is wholly inadmissible by reason of irregularity, parol evidence is admissible to prove what he voluntarily disclosed. And if it remains uncertain whether it was reduced to writing by the magistrate or not, it will be presumed that he did his duty, and oral evidence will be rejected. *Greenleaf's Ev.*, 259, sec. 227. The written statement should have been produced; the oral evidence of the witness should have been rejected. It was secondary and inferior. *Peter v. The State*, 4 S. & M., 31.

ERROR to the Circuit Court of Hinds County, for the Second District. Hon. GEO. F. BROWN, Judge.

The only material facts in the case, and upon which the case was disposed of, are stated in the opinion of the court.

*Johnston & Johnston*, for appellant, filed a very elaborate brief, and argued the case orally, citing the following authorities: R. C., 1871, §§ 2759-2806; Const. Miss., art. 1, sec. 7; Rev. Code, 1871,

50 339  
76 395  
50 332  
79 286  
79 287

---

Opinion of the court.

---

§ 2631; *Cotton v. The State*, 2 George, 504; Rev. Code, 1871, §§ 726, 728; *ib.*, § 2758; *Bales v. The State*, 24 Miss., 445; *Greenleaf's Ev.*, § 450; *Newcomb v. The State*, 37 Miss., 383; *Wesley v. The State*, *ib.*, 327; *Wharton's American Cr. L.*, sec. 636.

*G. E. Harris*, Attorney General, for the state, filed a brief and argued the case orally, citing the following authorities: *McDaniel v. The State*, 8 S. & M., 416-17; *Wesley v. The State*, 37 Miss., 349, 351-2; *Noe's case*, 4 Howard, 330; *Muirhead v. Muirhead*, 6 S. & M., 451; *Franks v. Wanzer*, 25 Miss., 121; *Ogle's case*, 38 *ib.*, 383; *Lundy's case*, 44 *ib.*, 669; *Wharton's American Law of Homicides*, 384-5; *ib.*, 34, 35; 38 Miss., 297; 36 *ib.*, 656; 8 S. & M., 401.

PEYTON, C. J., delivered the opinion of the court :

It appears that the plaintiff in error in this case was convicted in the circuit court of Hinds county, in the second district thereof, of the murder of one Charles Kelker and sentenced to be hung, and hence the case comes to this court by writ of error.

Various errors are assigned here in the record of the proceedings and judgment in the court below. But in the view we take of this case, we deem it necessary to notice only the tenth assignment of error, which impeaches the correctness of the ruling of the court in admitting oral evidence of what the defendant said in his voluntary statement before the justice of the peace, under the circumstances set forth in the record.

It is provided in section 2825 of the Code of 1871, that in all criminal cases brought before any justice of the peace, he shall take the voluntary confession of the accused, and the substance of the material testimony of all the witnesses examined before him, in writing, and shall inform the accused of his right to interrogate such witnesses. Which questions, and the answers thereto, he shall also reduce to writing; and the said proceedings and testimony so taken and had, the said justice shall certify and



---

Opinion of the court.

---

send up, together with the bonds and recognizances of the accused and the prosecutor and witnesses, to the next term of the circuit court of the proper county, on or before the first day of the term.

On the trial in the court below, one Daniel Murchison, a witness on the part of the state, was permitted to testify to what the accused had said in his voluntary statement before the committing magistrate, in opposition to objections from defendant's counsel. Said witness testified that he believed he remembered the substance of said statement, but that other matters might have been mentioned in that voluntary statement which witness did not remember, as he did not pay any very marked attention to the statement, although he was listening to the examination. The said voluntary statement was reduced to writing and signed by the defendant and produced in court by the prosecution.

As a general rule, applicable as well in civil as criminal proceedings, the law requires the production of the best evidence of which the case, in its nature, is susceptible. This rule does not demand the greatest amount of evidence which can possibly be given of any fact, but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud, for when it is apparent that better evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence of a nature merely substitutionary shall be received when the primary evidence is producible.

As the statute requires that the justice of the peace shall reduce to writing the voluntary confession of the accused, and shall certify and send up the same to the next term of the circuit court of the proper county, on or before the first day of the term; the law *conclusively presumes* that if anything was taken down in writ-

---

Opinion of the court.

---

ing, the justice of the peace performed his whole duty by taking down all that was material. In such case, no parol evidence of what the prisoner may have said on that occasion can be received. But if it be shown that the examination was not reduced to writing, or if the written examination is wholly inadmissible by reason of irregularity, parol evidence is admissible to prove what he voluntarily disclosed. And if it remains uncertain whether it was reduced to writing by the magistrate or not, it will be presumed that he did his duty, and oral evidence will be rejected. 1 Greenleaf's Ev., 259, sec. 227.

Oral evidence cannot be substituted for any instrument in writing (which is not merely the memorandum of some other fact), the existence of which instrument is disputed, and its production material to the issue between the parties, or to the credit of the witnesses. One advantage derived from the application of this rule is, that the court acquires a knowledge of the whole contents of the instrument, which may have an effect very different from a statement of a part. "I have always," says Lord Tenterden, in the case of *Vincent v. Cole*, M. & M., 258, "acted most strictly on the rule that whatever is in writing shall be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments. They may be so easily mistaken that I think the purposes of justice require the strict enforcement of the rules."

This rule, however, does not apply where the instrument in question is shown to be destroyed or lost, or where the party who relies upon it is otherwise incapacitated from producing it.

In the case under consideration, the record shows that the voluntary statement of the accused was taken in writing, and that being the primary and best evidence of what that statement was, should have been produced, and the oral evidence of the witness as to what the prisoner stated on that examination being secondary and inferior evidence, ought not to have been received on trial of the prisoner. *Peter v. The State*, 4 S. & M., 31.

---

Syllabus.

---

In the admission of this parol evidence on the trial of the case below, the court erred.

For this reason, the judgment will be reversed, the case remanded and a new trial awarded.

---

ORNE BERNARD et al. v. JAMES W. ELDER et al.

1. PLEADINGS IN EJECTMENT — RULE AT COMMON LAW. — At the common law the defendant in an action of ejectment was permitted to make defense upon the terms, that he entered into the "consent rule" and pleaded the general issue. No other plea was admissable.
2. SAME — RULE UNDER THE STATUTE (CODE 1857, p. 386). — The statute in dispensing with the fictions of the common law, still confined the defendant to the plea of "not guilty" under which he might give "in evidence any lawful defense to the action," but if the defendant shall desire to dispute or deny his possession at the commencement of the action, he must do so by special plea, as the plea of the general issue has the effect of an admission that defendant was in possession at the commencement of the action.
3. MARRIED WOMEN — ACKNOWLEDGMENT OF DEEDS — WHAT SUFFICIENT. — The rule generally sanctioned by the courts is, that if the officer taking the acknowledgment discloses a substantial compliance with the law, although the forms and words of the statute are not pursued, it will be good. *Russ v. Wingate*, 30 Miss., 446; *Smith v. Williams*, 38 Miss., 48. The mischief which the statute intended to guard against, in requiring a separate examination of the wife, was the undue influence of the husband, which would be implied in his presence. If the wife was separated from the husband although others might be present, she was in a condition to act freely. *Love et al. v. Taylor et al.*, 26 Miss., 574.
4. SAME — CASE IN JUDGMENT. — An acknowledgment showing an examination separate and apart from the husband, and containing the words "fear, threats or compulsion of husband," omitting the words "as her voluntary act and deed," "freely" is good.

ERROR to the Circuit Court of Harrison County. Hon. GREEN C. CHANDLER, Judge.

---

Brief for plaintiff.

---

This is an action of ejectment brought to the November term, 1858. Plea of not guilty filed November 28, 1858. Four special pleas were filed May 30, 1860, also six other special pleas, and on the same day, plaintiffs filed a demurrer to all of said special pleas, which was sustained as to the 1st, 3d, 9th, 10th and 11th pleas and overruled as to all the others. Replications were filed July 6, 1871, to these pleas. The case was tried on the 11th of July, 1871, and four instructions were given on the part of plaintiffs, and four on the part of defendants (as these instructions were not noticed by the court, they are omitted in this statement). There was a judgment for defendants. Plaintiffs moved for a new trial, which was overruled. The errors assigned are :

1. The court below erred in overruling the plaintiffs' demurrer to the defendants' 2d, 3d, 5th, 6th, 7th and 8th special pleas.
2. The court below erred in giving the instructions asked for by defendant.
3. The court erred in refusing to give the 3d, 4th, 6th and 7th instructions asked for by plaintiff.
4. The court erred in permitting the deed, purporting to have been made by Joseph Ladner and Rosalie Ladner, his wife, to M. Dupas, to be read in evidence.
5. The court erred in permitting the deed from M. Dupas to Didier to be read in evidence.
6. The court erred in permitting the deed from Didier and Viat to J. W. Elder to be read in evidence.
7. The court erred in overruling the motion of plaintiff for a new trial.

*Champlin & Wood*, for plaintiffs in error, contended :

1. That in an action of ejectment, the only plea allowable is the general issue or "not guilty," and under this plea the defendant might give in evidence any lawful defense to the action. Code of 1857, p. 386, art. 3. That the court erred in overruling the demurrer to defendants' pleas, as they set up the statute of limita-

---

Brief for defendants.

---

tions of seven years, and at the time the action was brought, there was no statute of seven years in force.

2. That the deed from Ladner and wife to Dumas should not have been admitted in evidence, as there was no sufficient acknowledgment of the deed by Mrs. Ladner, and cite How. & Hutch., Code, p. 347, § 19.

*G. L. Potter*, on the same side, filed an elaborate brief, relying substantially upon the points made and authorities cited in the brief of the other counsels, and insisting that the deed dated August, 1843, did not convey the legal title of Mrs. Ladner, because at that time it was vested in the United States. This deed contains no express covenants, nor does it use the words "grant," bargain, "sell," from which the statute implies covenants. Hence this deed would not operate as an estoppel, even though the grantor was not covert. *Pike v. Golvin*, 29 Me., 183.

*Harris & George*, for defendant in errors:

The main question in this case is as to the sufficiency of the certificate of acknowledgment. It is certainly untechnically and unskillfully drawn, but such instruments are treated with great indulgence by the courts. The real acknowledgment is generally correct, and it is only the certificate of the officer as to what was done that is sufficient. They are therefore sustained when it can be done by fair legal intendment. See *Russ v. Wingate*, 30 Miss. R., 440; *Luffborough v. Parker*, 12 S. & M., 48; *Jackson v. Gumaer*, 2 Cow., 567; *Nantz v. Bailey*, 3 Dana, 111; *Shaller v. Brand*, 6 Binny's R., 438.

In *Morse v. Clayton*, 13 S. & M., 373, a certificate of the proving of a deed by a subscribing witness, was construed to show, "that the affiant subscribed his name as a witness in presence of the grantor, and that he saw the other subscribing witness subscribe the same in the presence of the grantor," from this statement contained in it: "that the deed was signed, etc. in presence of affiant and in presence of R. E., the other subscribing witness."

The conclusion was drawn from the statement, that affiant and

---

Brief for defendants.

---

R. E. were subscribing witnesses, and they meant they attested according to law.

In *Smith v. Williams*, 38 S. & M., 48, "executed," in the certificate, meant "signed, sealed and delivered;" and in *Hall v. Thompson*, 1 S. & M., 44, an acknowledgment that "it was his act and deed," was equivalent to that "he signed, sealed and delivered" it. In *Lehr v. Doe*, 3 S. & M., 470, the person who made the acknowledgment was omitted from the certificate. He was held to be by the statement, "that — whose name appears to the foregoing deed," acknowledges, etc.

In *Lehr v. Taylor*, 4 Cushm., 567, "voluntarily," in a certificate of married woman's acknowledgment, was held equivalent to the words, "as her voluntary act and deed, freely," as required by the statute.

In same case, the omission of the words, "private examination," was justified because it was stated "that she was examined separate and apart from her husband." Both phrases are required by the statute to be used, but the court held, that as the sole object to be guarded against was the influence of the husband, it was sufficient to show an examination separate and apart from him.

The objection here is, that it is not shown that she made the deed "as her voluntary act and deed freely." But it is shown that she was examined separate and apart from her husband, and that she acknowledged that she executed the deed "without fear, threats or compulsion from him."

This shows that she acted freely. For if the influence and constraint of the husband are, as described in *Love v. Taylor*, the things only to be guarded against, and if she acted without such influence or constraint, it is impossible to conceive that she did not act "freely."

The objection that the acknowledgment is in the past tense is frivolous. It is simply bad grammar.

SIMRALL, J., delivered the opinion of the court.

---

Opinion of the court.

---

This was an action of ejectment brought by the plaintiffs in error, to recover possession of a parcel of land on the bay of Boboxi.

The defendant pleaded the general issue, and several special pleas, setting up the statute of limitations of seven and ten years (and other matters not necessary to be stated), in bar of the action.

To these pleas there were demurrers. To some of the pleas the demurrers were sustained, and overruled as to others.

These rulings of the circuit court are assigned for error.

At the common law the defendant was permitted to make defense upon the terms that he entered into the consent rule, and pleaded the general issue. No other plea was admissible.

The statute, in dispensing with the fictions which pertained to the common law action, still confined the defendant to the plea of not guilty. Code 1857, p. 386, art. 3, under which he "may give in evidence any lawful defense to the action," except that if the defendant shall desire to dispute or deny his possession at the commencement of the action, he may do so by special plea. See art. 8, p. 387. This modification became necessary because of the 5th art., which made the plea of general issue have the effect of an admission that the defendant was in possession "at the time of the commencement of the action."

The action then, as regulated by statute, admits all defenses under the "plea of not guilty," except the single one of non-possession, which must be made by special plea.

All the matters relied upon in the several special pleas were available under the general issue. Indeed, the statute dispensed with special pleading, with the exception above named. It would have been proper for the court to have ordered these pleas to have been withdrawn from the files, or to have sustained the demurrers to them, as alien to this form of action. It is not necessary therefore to consider their merits, or the decisions of the court upon them.

Both parties claim the *locus in quo*, through Rosalie Ladner; the

---

Opinion of the court.

---

plaintiffs as her heirs at law, the defendant by mesne conveyance from her.

The plaintiffs read in evidence a patent from the United States, dated in 1847, to Angeline Fasiar, embracing the land in controversy, in virtue of a right confirmed under an act of congress of 1819, and proved that their mother, who was dead, was a daughter and one of the heirs of the said Angeline. They also introduced in evidence, a deed, executed by her heirs, in 1842, reciting and confirming a partition of the land descended, which had been made many years before, but the evidence of which had been lost. By this instrument, the premises sued for had been assigned and set off to the said Rosalie, their mother.

Defendants proved by a witness that one Dupas bought the land in controversy from Joseph Ladner and Rosalie his wife; put some small improvement upon it, and occupied it for about eighteen months.

A deed of conveyance from Ladner and wife to Dupas was read in evidence to the jury against the objection of the plaintiffs. Also a deed from Dupas to Didier & Piott, and from them to J. W. Elder, the ancestor of the defendants. There was testimony that J. W. Elder took a lease from Didier & Piott in 1850, and held under it for three or four years. Joseph Ladner died in 1846 or 1847. Rosalie, his wife, died in 1856 or 1857.

If the conveyance made by Ladner and wife was valid as to the wife, the plaintiffs have no title, and it becomes unnecessary to consider the various points raised by the assignment of errors. It is not shown in evidence that Ladner and wife, or either of them, or any of the plaintiffs, have ever been in possession of the land, since the date of the conveyance to Dupas. There is testimony that the only use and possession has been in Dupas, and those claiming derivatively from him.

The objection to this deed is a defective acknowledgment by Mrs. Ladner.

The rule has been very generally sanctioned by the courts,



---

Opinion of the court.

---

founded as it manifestly is in wisdom, that if the certificate of the officer taking the acknowledgment, discloses a substantial compliance with the law, although the form and words of the statute are not pursued, it will be good.

The duty is committed to a large class of officers, many of whom are, it is well known, illiterate and inexperienced, and to apply to their acts nice and technical criticism, would endanger the title to much property which has been purchased in good faith, and for fair value. The legislature were impressed with the necessity of giving a liberal interpretation to these certificates of acknowledgment. For it prescribes a form to be used by the officer, and declares that any other formula, "of the like effect," shall be equally valid.

They are to be examined in a spirit of liberality and indulgence, and should be sustained when it can be done by fair legal intendment. *Russ v. Wingate*, 30 Miss., 446, and cases there cited. *Smith v. Williams*, 38 Miss., 48.

The form of the certificate is as follows, after reciting the personal appearance of the husband before the justice, and his acknowledgment, it continues: "Also Rosalie Ladner, wife of Joseph Ladner, who has been examined separately and apart from her husband, has declared that she has signed, sealed and delivered these presents, without fear, threats or compulsion of her husband," etc. Comparing this with the statute, *Hutch. Code*, p. 608, sec. 19, it will be noted that the words "private examination," and "as her voluntary act and deed," "freely," are omitted.

Is the certificate, to "the effect of," or of the same import as the requirements of the statute? The policy and intent of the statute was very maturely considered in the case of *Love et al. v. Taylor et al.*, 26 Miss, 574 and 5. In the first opinion delivered, the court, following the case of *Warren v. Brown*, 25 Miss, 6, held the acknowledgment of the *feme covert* to be insufficient. But upon a reargument and reconsideration of the point, the case of *Warren v. Brown* was overruled, and the deed sustained. The

---

Opinion of the court.

---

certificate, as in the case before us, omitted the words, "private examination," but contained the word "voluntarily." The judgment of the court was placed upon the ground, that the mischief which the statute intended to guard against, was the undue influence of the husband, which would be implied in his presence. If the wife was separated from him, although others might be present, she was placed in circumstances to act freely. The court say, "That the undue influence of others does not appear to have been contemplated;" nor "that the influence of the husband might be exerted through other persons present at the examination."

The statute proposes to protect the wife against the marital control and influence, as said by the court, "what she is required to acknowledge has reference entirely to her husband, namely, that she acted without fear, threats or compulsion of her husband."

Mrs. Ladner acknowledged that she signed, sealed and delivered the instrument, and that she did so without the fear, threats and compulsion of her husband. This is certified to have occurred separate and apart from him. If the words used, by fair intendment, imply, that her execution of the deed was "voluntary" and "free," the requirements of the law are satisfied. If she acted without constraint and compulsion of her husband, and that was the undue influence which the statute intended to obviate, then enough appears to show that her conduct was free and voluntary. An acknowledgment of freedom from marital control and influence, puts her within the intendment of the statute in the category of a *feme sole*. The words, "without the fear, threats or compulsion of her husband," import that the conveyance has been made unbiased by him.

If the influence of other persons had been in the mind of the legislature, the requirement would have been not only that the examination should be private as to the husband, but also as to others. The words, "fear, threats or compulsion of the hus-

## Syllabus.

band," are used as the antitheses of "free" and "voluntary," specifically directing the magistrate as to the subjects of his examination.

By giving to the statute the literal construction inculcated by its intendment, we think that the acknowledgment of Mrs. Ladner is substantially good, and the deed to Dupas passed her estate.

The judgment is therefore affirmed.

---

W. B. PRINCE v. CRAWFORD & GAITHER.

50	344
194	921

1. **PARTNERSHIP—GENERAL AND LIMITED—RESPECTIVE POWERS THEREOF.**—The principle applicable to general partnerships is, that all acts done by one partner in the course of the business is in legal effect as if done by all. Each partner is constituted an agent for all, as to all matters within the scope of the business. Restrictions imposed by partnership articles have no operation in transactions with strangers unless they have notice of them. In partnerships of a limited character the measure of authority imparted to an individual member to bind the firm in transactions with third persons is limited by the nature of the business.
2. **SAME—PLANTING PARTNERSHIPS—LIABILITY TO THIRD PARTIES.**—In planting partnerships there is not implied power in the several members to borrow money, draw bills of exchange, etc., and thereby bind the firm. Those who deal with individual members of *such firms* must at their peril inform themselves of the articles of association and the power communicated to each to bind all. Story on Partn., § 216. The extent of the liability of such firm for the acts of its members depends upon the nature and scope of the business, and where one member exceeds the usual power of such partnerships the party dealing with the member must show that he had authority to bind the firm or that the members of the firm acquiesced in the act, before the firm would be bound thereby.
3. **SAME—ERRONEOUS INSTRUCTIONS.**—The second charge for the plaintiffs was erroneous, because it might have misled the jury as to the liability of the firm for the acts of one of its members. The third instruction for plaintiff was obnoxious, because it tended to mislead the jury in that they may have construed it as embracing the idea, that if one member of the firm was in the habit of drawing drafts in the purchase of supplies,

---

Statement of the case.

---

in the firm name, that established the "usual practice of the firm." For the same reasons the modifications of the first and second charges for defendant are erroneous. The modification of defendant's third charge is objectionable, in that in order that silence or negligence may have the effect of binding the nonparticipating partner, it ought to be shown that he was so situated that he must have known it, or it should be inferred that he did know of the course of business, so that his conduct would mislead and deceive if he were permitted to plead nonacquiescence.

ERROR to the Circuit Court of Washington County. Hon. C. C. SHACKELFORD, Judge.

This was an action of assumpsit brought to recover on a bill of exchange in the following form :

\$2,255.79.

NEW ORLEANS, 11th July, 1870.

On the 10th day of October next, pay to the order of ourselves twenty-two hundred and fifty-five 79-100 dollars, for amount due Crawford & Gaither, value received, and charge to account of PRINCE & MORROW.

By T. L. MORROW.

To HADDEN, OVERTON & BUNCH, New Orleans, La.

Indorsed Prince & Morrow.

The defendants are declared against as partners under the style of Prince & Morrow. W. B. Prince pleaded that he was not a partner of Morrow as charged in the declaration, and that Morrow had no authority to draw the bill in his name or to sign his name thereto, and swore to the plea. To this plea there was a demurrer filed, which was sustained. Under the judgment *respondent oster*, Prince pleaded as follows : 1. That he was not a partner of Morrow's when the bill was drawn. 2. That Morrow had no authority in law or fact to draw the bill in the name of Prince. 3. That the bill was not his act, and was not made by him.

All the pleas are verified by affidavit. The replications allege that Prince was a partner of Morrow when the bill was drawn, and that Morrow did have authority to draw the bill in the name of Prince under the firm style of Prince & Morrow. There was jury verdict and judgment against Prince and in favor of defend-

---

Statement of the case.

---

ant in error. Morrow having entered his appearance, and failed to plead, there was a separate judgment entered against him by default for the amount of the plaintiff's demand. There was a motion made by Prince for a new trial, for the following reasons:

1. The verdict of the jury is contrary to the law and evidence.
2. The court erred in the instructions for plaintiff
3. The court erred in refusing and modifying the instructions asked by the defendant, and for other causes, etc.

This motion was overruled, and a writ of error taken to this court.

The agreement of partnership between Prince & Morrow was as follows:

"The following articles and terms of partnership, this day made and ratified by and between W. Berry Prince and T. L. Morrow, witnesseth as follows: The said parties agree to plant for the term of three years, or so long as it may be agreeable to them, or either of them, upon said Prince's plantation, lying in Washington county, Miss., and known as the 'Lake place.' Should either of said parties become dissatisfied and wish to terminate said partnership at any time before the limit hereabove set forth, the same may be done by the dissatisfied giving six months' notice prior to the first of January of any year. The said Prince agrees to furnish the land to be cultivated free of any charge for rent, and in consideration thereof the said Morrow agrees to oversee and manage the place free of charge; and in further consideration of land rent free, the said Morrow agrees, at the mutual expense and charge of himself and said Prince, to place said plantation in a perfect state of repair by thoroughly repairing the dwelling and the cabins and outhouses; also, to erect a new and substantial stable and corn cribs, and to fence the place. Further, said Morrow here undertakes to provide the mules meat, corn, farming utensils and materials necessary to the farming and refitting the plantation for and during the year 1869, without calling upon said Prince, and to repay himself for said Prince's half of the same out of Prince's half of the crop to be raised

---

Statement of the case.

---

during the year 1869. It is further agreed and understood that all the expenses incident to the proper management and cultivation of said place (save the expense of an overseer or manager, which, as above stated, said Morrow agrees to pay himself) shall be borne equally by said parties. Said Prince's portion thereof to be paid, as stated, out of his part of the proceeds of the crop. Said Morrow also here agrees and binds himself to leave said place, whenever such partnership terminates, in a perfect state of repair, or to make up to said Prince the deficiency in money. Further, that after the said expenses are paid, the net proceeds of the crop are to be divided equally between said parties.

"In faith whereof we have hereunto set our hands and seals, this 17th day of December, 1868.

"W. BERRY PRINCE, [Seal.]

"T. L. MORROW." [Seal.]

It was in evidence for plaintiffs below that plaintiff in error was a member of the planting firm of Prince & Morrow; but all persons who had dealings with the firm had them with Morrow, who resided on the place jointly cultivated. None of them knew or had ever seen Prince; none of them had any personal knowledge of the terms of the partnership, but some of them had seen mules and cotton, on the place on which they planted, branded Prince & Morrow, and had sold mules to Morrow, who, in payment therefor had given a draft on New Orleans signed Prince & Morrow, which draft was paid upon presentation. It was also proven by the seller of the mules, for which the draft in controversy was given, that he would not have sold the mules to Morrow individually, and not at all, had he not known that he and Prince were partners, and that Prince was solvent:

It was proven for defendant below, that he never authorized the drawing of the bill in litigation; that he never authorized Morrow to sign his name to any paper or note; that he had no notice of the drawing of the draft until the fall of 1870; that as soon as he learned that Morrow was drawing drafts in the firm

---

Statement of case.

---

name, on New Orleans, he had letters written to his commission merchant to inform the factors upon whom the drafts were being drawn; that he had left \$5,000 of his part of the crop of the previous year to pay his portion of the plantation expense; and that Morrow must be drawing bills for his private purposes; that he never had nor could get a settlement of the plantation affairs with Morrow. That he never received anything from the crops while planting with Morrow, and was never on the plantation during the partnership. In June, 1870, he gave Morrow the notice required by the agreement to terminate the partnership. It was also proven for defendant that Morrow admitted that the mules, for which the draft in controversy was given, were not needed in cultivating the plantation, but were bought for speculation.

The instructions given for the plaintiffs below, which were reviewed by this court, are:

2. "If the jury believe from the evidence that the defendants Prince & Morrow were cultivating the plantation of Prince in this county on their joint account as partners in planting, and that Morrow drew the draft in question, signing the same Prince & Morrow, by T. L. Morrow, and that the draft was given for necessities, and was usual with said firm or others in like business for the proper carrying on of their business as such planting partners, then Prince is bound as well as Morrow on the draft, and the jury will find for the plaintiffs on the two special pleas."

3. "If the jury believe from the evidence that the defendants Prince & Morrow were cultivating the plantation of Prince in this county on their joint account as planting partners, and that Morrow drew the draft in question, signing the same Prince & Morrow, by T. L. Morrow, and that it was the usual practice of the firm for Morrow to draw drafts in the purchase of supplies or necessities, and the draft sued on was given for supplies or necessities for the firm in that form, then Prince is liable on the draft, and the jury will find the issue on the two special pleas for the plaintiff."

---

Statement of the case.

---

And those for the defendant with the modification of the court, are:

1. "If the jury believe from the evidence that Prince & Morrow were engaged in planting on joint account upon a plantation belonging to Prince, and that the terms of the agreement were to the effect that Prince would furnish the land free of rent, and that Morrow would furnish the mules, farming utensils, meat, etc., and repay himself out of Prince's half of the crop; and that Morrow had no authority from Prince to draw the bill of exchange sued on — *modification* [or the same was not given for necessary supplies in carrying on the plantation, and was the usual course pursued by others engaged in like partnerships], the jury will find for defendant."

2. "If the jury believe from the evidence that a planting agreement existed between defendant Prince and Morrow, by which Morrow agreed to furnish the mules to be used on the place, and that Morrow bought the mules by means of the draft sued on, and signed the name of Prince & Morrow to the same, without the authority of Prince, and that the parties who took the draft were not induced to do so by any act or expression of Prince, either of omission or commission, or to believe that the same was so signed by his consent, but depended solely upon the statements and acts of said Morrow, which were unauthorized by Prince, or not acquiesced in by Prince, and if they further believe that such signing by said Morrow was against the wish and express agreement of said Prince — *modification* [and said draft was not drawn for necessary supplies for said plantation and in the usual course of business of the partnership, or of partnerships of like character], they will find for defendant."

3. "The mere existence of a farming agreement or partnership between two parties does not authorize the drawing of bills or notes by either to charge the other. This rule applies to mercantile or commercial partnerships in which such acts grow necessarily out of the business. In planting partnerships or agreements,



---

Brief for plaintiff.

---

persons dealing with the partner separately, do so at their peril, so far as the personal liability of the partners is concerned, and cannot recover as against the partner not directly concerned, unless they can establish by evidence that such partner authorized or consented to the contract with the other — *modification* [either directly or by his silence or negligence, permitted such contracts to be made under the supposition that he was a partner and such contracts were made for necessary supplies and in the usual course of business of the partnership].”

The errors complained of are :

1. The court erred in permitting any further proceedings to be had in the case after judgment was rendered against T. L. Morrow ; the rendition of that judgment being to all intents and purposes a conclusion of the suit and necessarily operating in law as a discontinuance thereof as to said Prince.

2. The court erred in overruling the exceptions taken by plaintiff in error in the court below to the depositions of Crawford and Gaither, Patterson and Chaffe. Said exceptions should have been sustained and the depositions excluded from the jury.

3. The court erred in overruling the motion for a new trial.

4. The court erred in not overruling plaintiff's demurrer to defendant's first plea, and in not extending it back to the declaration or the second count thereof.

5. The court erred in modifying and refusing instructions asked by defendant in the court below.

*W. L. Nugent*, for plaintiff in error :

The principles of law applicable to commercial and general partnership, cannot prevail in this case. The parties were simply engaged in cultivating a plantation under written articles of agreement, defining and limiting the rights, duties and obligations of each, and there was no implied authority in either to draw a bill of exchange for the other, or in the joint names of both. The plaintiff in error was not liable upon the bill drawn by Morrow, unless the money thereby realized was necessary for the busi-

---

Brief for plaintiff.

---

ness and the credit of the planting firm usual, as shown by the practice of the firm or others, in similar business. Prince did not sign the bill sued on, nor did he authorize its signature, and all the statements of the witnesses in connection with what "Prince & Morrow" had done, when sifted, are nothing but what Morrow alone did, without the knowledge or consent of his partner. The defendants in error never had any dealings with Prince, who knew nothing about the drawing of the bill of exchange in suit. They were bound to know the extent of Morrow's authority under the articles of agreement; and they negatived any power to pledge the credit of the firm. Tested by the rules of law applicable and the evidence before the jury, the instructions of the court below were manifestly improper, and certainly misled the jury. *Dickinson v. Valpy*, 10 Barn. & Cressa, 138; *Belcher & Davis v. Richardson & May*, MSS. opinion.

*Harris & George*, for plaintiff in error.

The charges given on behalf of the plaintiff are very long and are difficult to be understood. We extract from them, however, the following propositions:

1. That Prince & Morrow, being planting partners, if M. was in possession of the plantation, openly and notoriously conducting it in the name of Prince & Morrow, with the knowledge on the part of Prince that he was so acting, then P. was liable, notwithstanding the terms of the partnership articles.

2. That if the above acts were continued by Morrow for a year, Prince is liable whether he knew of them or not.

3. If the draft sued on was given for necessities as was usual with the firm of Prince & Morrow, Prince is liable, whether he had knowledge of such usage or habit of Morrow or not.

4. That Prince is liable on the draft if it was given for supplies, and the giving of drafts was usual in like partnerships, or was usual in the firm of P. & M., whether P. knew of such usage of M. or of other firms or not.

5. That although as a planting partner, P. was not bound by the

---

Brief for plaintiff.

---

drafts of M., yet he would be bound if the contract was made for supplies, and Prince either directly or by his silence or negligence, permitted such contract to be made under the supposition that M. was his partner.

Until the decision of this court in *Davis v. Richardson*, 45 Miss. R., the difference between planting or farming partnerships and commercial partnerships was not correctly understood either by the community at large or the profession. It was conceived that there was some magic in the name of "partner" which rendered one holding that relation to another absolute maker of the fortunes of his associate by endowing him with unlimited power to make all contracts which might by possibility be considered as made for and on behalf of the firm.

This was evidently the idea upon which this plaintiff acted, for they both swear that they gave the credit to Morrow, because they understood P. & M. were partners, and that they saw cotton and mules marked in the name of P. & M. They trusted because they believed P. & M. were partners in planting. This theory of the plaintiff was exploded by the decision in *Davis v. Richardson*, which denied to planting partners, as a result of that relation, the power to make notes and bills in the firm name. And afterwards in *Cooper v. Frierson*, Miss. R., the doctrine was still further explained by a ruling that when parties were associated for farming purposes, it was the duty of one treating concerning the firm business with one of the parties interested, to inquire into the real nature of his powers. If this had been done here there would have been no controversy, for the partnership agreement expressly denied to Morrow to bind Prince by the contract sued on.

There being no real power in Morrow to bind Prince, as his planting partner, the attempt is made to hold Prince liable upon several grounds:

1. That Prince held Morrow out to the world as having these powers, and that such holding out consisted of a series of acts of like character committed by Morrow in the partnership name,

---

Brief for plaintiff.

---

whereby the usage of that particular partnership is established, and that Prince is bound by such usage by his silence and negligence in permitting it to grow up.

But the answer to this is plain. As a matter of law, no man can be committed to the holding out of another as his agent, except by his own acts. The acts and declarations of the alleged agent will not do to establish his authority, unless they are brought home to the knowledge of the alleged principal, and thereby become his acts. If this were not so, "he might incur a painful responsibility through the fraud or rashness of others." Collyer on Partners, § 97.

Besides, the theory on which one is held liable by such holding out is, that the public trusted to his acts creating such holding out, and to permit him to deny a responsibility thus indirectly admitted, would be a fraud on those who trusted him. The attempt here is to hold Prince liable, not because the public trusted to his acts and declarations, but to Morrow's. But it is said Prince was guilty of negligence in allowing Morrow so to act as to create the impression that he had the authority claimed for him. The answer is that Prince is not guilty of negligence until he has knowledge that Morrow was so acting. He must have knowledge. He was not bound to inquire into Morrow's conduct until something had been brought to his knowledge to excite inquiry. He lived one hundred miles from the domicile of the partnership; was never on the plantation till the partnership ended. He had a right to suppose that Morrow was acting according to the stipulations of the partnership articles. He was not bound to suspect fraud in Morrow, and was therefore guilty of no negligence.

But there is another complete answer to this pretension. The plaintiffs do not claim to have been influenced by any such "holding out." Whoever else may have been deceived by it, they were not. They trusted alone to the fact that Morrow was a planting partner. It is only those who have been misled by the "holding out" that can complain, if the real truth be shown.

---

Brief for plaintiff.

---

See *Shott v. Strealfield, Moody & R.*, 9; *Alderson v. Pope*, 1 Comp., 404.

2. It is error that he is bound because such was the usage of similar partnerships. But there is no proof of this usage, and besides, such a usage, if proven, must be shown to be known to Prince. The rule is, that a usage is not proveable at all, unless it be so long established, and so universal, that all persons in the locality affected by it must be presumed to know. Partial usages or customs of recent origin, not commonly recognized, can have no effect on the rights of parties. See *Schooner Reeside*, 2 Sumn., 567; *Shackelford v. N. O., J. & G. N. R. R. Co.*, 37 Miss., 206.

But the charges given, and the modifications made of charges asked for by Prince, were well calculated to mislead the jury. The jury were charged with reference to the usage of other partnerships, and there was no proof on that point. This was error. The court has no right to suggest in a charge, a statement of facts for which there is no evidence. See *Dix v. Brown*, 41 Miss., 131; *Burns v. Kelly*, 41 ib., 339; *Barker v. Justice*, 41 ib., 240; *Greenwade v. Mills*, 31 ib., 464; *Garnett v. Kirkman*, 33 ib., 389; *McIntyre v. Kline*, 30 ib., 367; *Heirn v. McCaughan*, 32 ib., 17; *Clarke v. Edwards*, 44 ib., 778.

The modification to the 2d charge asked for by Prince is especially objectionable. It announces the law to be, that Prince is liable, though Morrow had no real authority to make the contract, and was acting against the word and agreement of Prince, and plaintiff trusted alone to Morrow's statements, if the draft was drawn for necessary plantation supplies, and on the usual course of business of said partnership, or of partnerships of like character.

The rule below as thus modified is faulty in its failure to explain what was the meaning of the phrase "usual course of business of said firm." It presents no definite and clear idea. If it meant the usage and custom of the firm as represented by Morrow, then it is manifestly wrong, as has heretofore been shown. If it

---

Brief for defendants.

---

meant that if the transaction took place openly, and if there was nothing in it, either as to terms, manner, space or quantity, which was unusual, then the proposition announced gives a planting partner full power to bind the firm by all purchases, if they be only made in the usual manner.

The modification of the 3d charge is also objectionable; it makes Prince liable, if "he by his silence or negligence permitted such contracts to be made." The proof showed that Prince had not been in one hundred miles of the plantation during the whole time, and Prince had sworn that he knew nothing of Morrow's making contracts in the firm name. The instruction should have explained the circumstances under which silence was culpable, and the rules of law which applied to the question of negligence. The jury might have supposed that it was Prince's duty to watch Morrow, or have an agent to do so, and to discover when he was guilty of a fraud, and then repudiate it publicly. They are left wholly in the dark as to Prince's rights and duties in this respect. The modification introducing these terms should have plainly and explicitly laid down the law and all the exceptions and qualifications, so the jury could have comprehended it. See *Payne v. Green*, 10 S. & M., 507; *Cohea v. Hunt*, 2 S. & M., 227; *Young v. Power*, 41 Miss., 197; *Mullins v. Cottrel*, 41 ib., 291; *Greenwade v. Mills*, 81 ib., 464.

*Johnston & Johnston*, for defendants in error:

I. Morrow failed to plead and judgment by default was entered up against him. On the same day the cause was tried by a jury as to Prince the other defendant, and on the same day judgment on the jury verdict was rendered against the latter. There was no error in this proceeding against the defendants. *Rappeleye v. Hile*, 4 How., 295; *Henry v. Halsey*, 5 S. & M., 573. Where the cause of action (as in this case), was joint and several, it is not error to render judgment against one defendant on default, and another judgment against other defendants on verdict. *Peyton v. Scott*, 2 How., 870; *Lynch v. Commissioners*, 4 ib., 377.

---

Brief for defendants.

---

II. There was no error in admitting the testimony objected to by the defendant. But this evidence could not have affected the result. There is abundant evidence in the case to sustain the verdict on the points involved in the objection. A new trial will not be granted for the admission of illegal testimony to establish a fact which is otherwise proved in the cause, or where on the whole case it is apparent that substantial justice has been done. *Fore v. Williams*, 6 Geo., 533; *Hand v. Grant*, 5 S. & M., 508; *Pritchard v. Myers*, 3 S. & M., 42; *Mary Wash. College v. McIntosh*, 8 Geo., 671. Nor where the illegal evidence was merely cumulative. *Routh v. Ag. Bank*, 12 S. & M., 161.

III. The instructions considered together announced to the jury correctly the law of the case, and under the instructions as given by the court, the issue of fact as to the defendant's liability was fairly left to the consideration of the jury. The evidence shows that Prince was liable for the debt sued for. A new trial will not be granted for erroneous instructions, if the verdict be right according to the evidence, and in accordance with the justice of the case. 6 Geo., 506; 5 How., 495; 4 C., 282; 40 Miss., 191; 1 Geo., 504; 3 ib., 125; 44 Miss., 466. Without reviewing at length the evidence in the cause, we will briefly state that the defendants were partners engaged in planting operations. Morrow was in the habit of drawing bills for the plantation supplies, etc., and had done this for more than a year. He was the active manager of the business. The bill in this case was given for mules needed for cultivating the plantation of the firm. The mules were actually delivered on the plantation, were branded with the initials of the firm name, worked all the year in making the crop, and at the dissolution of the firm, on a settlement of the partnership they fell to Prince as his share of the firm assets. Although Prince denies that he *authorized* Morrow to sign bills in the firm name, yet from the evidence in the case it is apparent that the usage and course of business of the firm was such as to authorize the belief with all persons dealing with the firm, that Morrow had this power. Cer-

---

Opinion of the court.

---

tainly Morrow had the power to *purchase* the mules, and bind the partnership for the price. The evidence leaves no room for doubt on this point. We submit that substantial justice was done in the case, and a different instruction on the point pressed for plaintiff in error would not have changed the result.

IV. The fourth assignment of error is not well taken. The plea is double in this; it denies the partnership, and denies that Morrow had any authority to draw the bill of exchange sued on. The demurrer is based on the ground that the plea is double. In sustaining the demurrer, leave was given the defendant to plead over, whereupon he presented these defenses separately in two pleas. Even if it was technically an error to sustain the demurrer, the defendant has had the full benefit of the two matters of defense.

We submit that the judgment should be affirmed.

SIMRALL, J., delivered the opinion of the court:

The bill of exchange purports to have been drawn by Prince & Morrow, per T. L. Morrow, who are averred in the declaration to have been partners, and were sued in that capacity.

They were jointly interested in the cultivation of a plantation, on the terms set forth in the articles of partnership.

In the cases of *Richardson and May* *ads. Davis*, 45 Miss. Rep., 506, and *Cooper v. Frierson*, 48 Miss., 309, the difference between general trading and commercial partnerships, and those of a more limited character, was stated, as respects the authority of a member to make contracts and incur obligations which would bind all the members. As to the former, the principle is, that all acts done by one partner in the course of the business is in legal effect, as if done by all. Each partner is clothed with authority, or constituted an agent for all, as to all matters within the scope of the business. Restrictions imposed by partnership articles have no operation in transactions with strangers, unless they have notice of them.



---

Opinion of the court.

---

In associations of a more limited character, the measure of authority imparted to the individual member, to bind the partnership, in transactions with third persons, is limited by the nature of the business.

In a planting partnership, there does not exist the implied power in the several members to borrow money, make promissory notes, draw bills of exchange, and thereby bind the firm.

Those who deal with an individual jointly interested with another in the cultivation and production of agricultural products, must at their peril inform themselves of the articles of association, and the power communicated to each to bind all. Judge Story sums up, from the cases, the rule to be, that express authority must be given for the purpose, or that it is implied by the usages of the business, or the ordinary exigencies and objects thereof. Story Part., § 126.

The rule is founded in manifest wisdom and propriety. One man may be entirely willing to engage with another in the cultivation of a farm, on terms defined by articles, who would not risk his associate beyond that special business. A landlord might well agree to unite with one or several in the cultivation of his land, on joint account, on specific terms, who would not confide to him or those joined with him, the powers implied by law in a more general partnership.

One who holds himself out as a partner, or suffers it to be done, is often held to that responsibility by a third person. That is upon the principle that the credit was given, or the contract made on the faith of his actually being what he appeared to be, and what by his conduct he published himself to be.

But whether the liability is incurred, or the extent of it, in such circumstances, depends upon the nature and scope of the business. Prince held himself out as a member of this planting partnership. It does not matter whether it continued one, or two years, or more; the public could infer no more than that he invested Morrow with such authority as was germane to the business, which did not in-

---

Opinion of the court.

---

clude power to draw joint bills of exchange and promissory notes. Strangers, therefore, proposing to have such negotiations and transactions with Morrow, were put upon inquiry to ascertain whether he had express authority, or they must know that Morrow had been in the habit of so using Prince's name and credit, with Prince's sanction and acquiescence, which would have been of equal effect with an original authorization. Or it must be shown that he had authority to draw the bill from the habit of this firm, or usages of such business. But such usage must be so notorious, common, and public, that it must be presumed that Prince was aware of it.

Let us make an application of these principles, to the facts in evidence to the jury, and the instructions of the court.

The partnership agreement does not authorize Morrow to make contracts of the character sued upon.

Both of the plaintiffs in their depositions state that they had never seen Prince, and had no acquaintance with him. They knew from what they heard and what they saw, the marking and shipping cotton, and branding mules in the name of "Prince and Morrow," that there was a partnership, but not its terms. The draft was taken in renewal of two other drafts given by Morrow for mules, in the belief that Prince would be bound. In their dealings with Morrow, they had no other information of Morrow's power to make the joint contract, other than such as was disclosed by the above circumstances. From the existence of the partnership and the other circumstances detailed by them, they assumed that Morrow had the right to pledge the joint credit. They did not know, nor did they inquire whether Prince acquiesced in and consented to that mode of doing business.

Prince, in his testimony, emphatically denies that he authorized or assented to such use of his name, and had no knowledge or notice until informed by letter from Chaffe & Brother, factors in New Orleans, in Feb., 1870, that Morrow had run up a large joint account with them, when he took steps to notify them that it was without authority. He also denied knowledge of the bill of exchange until sued upon it.

---

Opinion of the court.

---

On the trial, Prince, to prevent a continuance, admitted that the absent witness would testify that he, Prince, was aware, during the continuance of the partnership, that Morrow was in the habit of drawing bills of exchange, shipping cotton, purchasing supplies, and making contracts and accounts in the joint name; that he had knowledge of the draft and of the purchase of the mules, and that they were necessary; and that upon the division of the joint effects, all or nearly all of the mules were received by him. If these statements were accepted as true, they would warrant the inference, or rather positively show that Prince consented to the use of his name and credit by Morrow, and that he ratified the purchase of the mules and the giving of the draft.

The testimony was conflicting and contradictory on the points of knowledge and acquiescence in the course of the business and subsequent ratification. There are circumstances in testimony derived from other sources than the defendant Prince, conflicting with what this witness would have sworn.

The credibility of testimony is especially intrusted to the jury. In such state of the evidence, the court would be assuming a responsibility unwarranted, to set aside the verdict unless there was a great preponderance of evidence against it, or unless the jury were misdirected by the court.

The charges to the jury are so numerous and voluminous, that it would require perhaps more discrimination than usually belongs to the nonprofessional mind to digest, and apply them to the testimony.

The second instruction for the plaintiff may have had the effect of misleading the jury. The court informed the jury that Prince is liable if the "draft was given for necessities, and was usual with said firm or others in like business, in carrying on their business," etc. To affirm that a certain line of business is usual with a firm, implies that the several members concur in what is done. The very point controverted by Prince was, that he did not consent. To prove that a certain course of business was

---

Opinion of the court.

---

usual, so as to charge a member who did not participate in its management, it must be shown that the active manager so conducted the business that his partner was cognizant of it, or circumstances must be put in evidence from which that inference may be drawn. But further, there was no testimony before the jury as to what was the usage of similar planting partnerships.

The third instruction is obnoxious, to the objection of tending to mislead the jury, because the jury may have construed it as embracing the idea that, if Morrow was in the habit of drawing drafts in the purchase of supplies and necessities in the firm name, that established "the usual practice of the firm," although Prince may have known nothing about it. It was proved that Prince had not been in Washington county where the planting operations were conducted, from its beginning until long after the partnership closed. There was testimony—whether creditable or not was for the jury to determine—that he was ignorant of what Morrow was doing. In this condition of the testimony, it was eminently proper to have qualified the instruction as we have suggested.

The same objection lies to the modifications of the 1st, 2d and 3d instructions asked by the defendant. It may be observed, as respects the modifications of the 3d charge, that in order that silence or negligence may have the effect of binding the non-participating partner, it ought to be shown that he was so situated, as that he must have known, or it should be inferred that he did know of the course of business, so that his conduct would mislead and deceive, if he were permitted to plead ignorance and nonacquiescence.

It seems, therefore, that on the vital question in controversy, the jury may have been misled to the prejudice of the defendant.

Judgment reversed and a *venire facias* awarded.

---

Opinion of the court.

---

## SARAH L. HODGES et al. v. MARTHA PHILLIP et al.

1. PRACTICE — CHANCERY — ANSWER MUST BE SWORN TO. — In this state an answer to a bill in equity must be sworn to, otherwise it will, upon motion of complainant, be stricken from the files, and if the respondent declines to plead further, the cause may proceed regularly to final decree. This is the established practice in England and America. 1 Daniels Ch. Pr., 749, et seq. and notes. It is also the established practice in this state. Code of 1857, p. 547, art. 55; Rev. Code, 1871, § 1029.

APPEAL from the Chancery Court of Noxubee County. Hon. THOMAS CHRISTIAN, Chancellor.

Complainants filed their bill in the chancery court of Noxubee county, based upon a writing obligatory, executed to them, as the bill alleges, in part payment for a lot of land in the town of Macon. The bill seeks to enforce the vendor's *lien*. The defendants filed an answer, but did not swear to it; complainant moved to strike it from the files, which motion was sustained, and defendants declined to plead further; a *pro confesso* was taken and decree rendered in accordance with the prayer of the bill, and the appeal is prosecuted to this court.

No counsel appeared for appellants.

*Jarnigan & Rives*, for appellees, filed a motion to dismiss, as a delay case.

TARBELL, J., delivered the opinion of the court:

An unsworn answer was, for that cause, on motion, stricken from the files. Respondents declining to plead further, the cause proceeded regularly to a final decree, when an appeal was prosecuted to the action of the court in striking the answer from the files.

This action of the chancellor was in accordance with the English and American practice. 1 Daniel's Ch. Pr., 746, et seq. and notes. It is also the established practice in this state. Code, § 1029; Code of 1857, p. 547, art. 50; Hutch. Code, 770, § 3.

In one or two of the states, an answer on oath may be waived

## Statement of the case.

in accordance with special statutes ; but with us, the rule is as above stated. No question is made as to the merits.

Decree affirmed.

## MARY B. IRWIN et al. v. A. J. LEWIS.

50	363
76	71
50	363
80	14

1. **HOMESTEAD EXEMPTION — HOW OBTAINED.** — If a debtor occupies property as a residence, and is the head of a family and a householder, such property, to the quantity and value named in the statute, is exempt from "seizure and sale." The law attaches to the ownership of the debtor that immunity. Property liable to levy and sale at the date of the rendition of a judgment can be impressed with the rights of a homestead before either a levy or sale. And it is immaterial how short a time before the sale this is done. *Trotter v. Dobbs et ux.*, 38 Miss., 198.
2. **EQUITABLE RELIEF — INJUNCTION.** — A chancery court has the power to intervene and prevent the sale of real estate under legal process, upon the allegation that such a proceeding would culminate in casting a cloud upon complainant's title. The levy upon the property is one mode of embarrassing the title.
3. **SAME — SAME — WHEN EXERCISED.** — The test of the right to equitable interposition is not merely that there is a remedy at law, but that remedy must be adequate, as practical and efficient to the ends of justice, as the remedy in equity.
4. **SAME — SAME — CASE IN JUDGMENT.** — When property claimed as a homestead is threatened with sale under a legal process, a bill in equity, to restrain the sale thereof, is the proper remedy.

**APPEAL** from the Chancery Court of Claiborne County. Hon. JAMES M. ELLIS, Chancellor.

In June, 1868, appellants recovered separate judgments against appellee. On the 27th March, 1871, *venditioni exponas* was issued upon each of said judgments commanding the sheriff to sell lots one and two, in the town of Port Gibson, the same having previously been levied upon as the property of appellee under writs of *fi. fa.* The sheriff advertised the lots for sale.

Thereupon appellee presented his bill for an injunction of the sale, alleging that at the rendition of the judgments, he was a

---

Statement of the case.

---

married man, a householder and head of a family, residing and domiciled in the town of Port Gibson, and was such at the time he purchased and moved on the property levied on. That he has continued to occupy the property as his home and place of residence ever since he purchased it. That in the latter part of the year 1869, his wife died, but that he and his servants have ever since continued to reside and keep house on said premises. That he again married in April, 1871, and has ever since occupied the premises with his wife and family as his home and residence. That the property is situated in an incorporated town, and is not worth over \$2,000, and is exempt from seizure and sale under execution. That the premises are advertised for sale by the sheriff, and that such sale will cast a cloud upon his title and homestead, etc., and prays for an injunction to restrain the sale thereof, etc.

To this bill, appellants filed an answer, setting out that appellee was not a married man from 1869 to 1871. That he had no children; was not the head of a family, and was not entitled to any homestead under the law. That the marriage of appellee in 1871 was fraudulently consummated to defeat the sale of the property. That complainant has a full and adequate remedy at law by motion to set aside and vacate the levies, etc.

A motion to dissolve the injunction on the bill and answer was made, which motion was overruled and a decree rendered perpetually enjoining the sale of the premises in controversy. From this decree an appeal was taken, and the following causes of error assigned:

1. That the court erred in granting the injunction in the first instance.
2. That the court erred in overruling the motion of defendant-appellants for a dissolution of the injunction.
3. That the court erred in allowing Mrs. Mary H. Lewis, wife of complainant, to be made a party defendant to said cause.
4. That the court erred in not dismissing complainant's bill with costs and damages.

---

Brief for appellants.

---

5. That the court erred in decreeing that the complainant was entitled to the relief prayed for by him, in decreeing said property exempt from sale under said judgments and executions, in releasing, cancelling and annulling said levies, in making said injunction perpetual and in taxing defendants-appellants with the costs of said cause.

*Berry & Drake*, for appellants, contended :

1. That as exemptions are a matter of grace and favor to debtors, they are within the discretion of the legislature to regulate, abolish, etc., at pleasure. That § 2145 of Code of 1871 abolished all exemptions for debts contracted prior to Sept. 1, 1870, thereby letting these judgment liens vest in and attach to the property in controversy; hence the appellee is without remedy at law or in equity. That having once vested, no action of the legislature or of the appellee could divest them. *Freeman's Ch. R.*, 584.

2. That appellee had a full and adequate remedy at law, and hence a court of equity had no jurisdiction. *Ezelle v. Parker*, 41 *Miss.*, 521; 1 *Kelly*, 7; 3 *ib.*, 435; 1 *Morris* (N. J.), 461; 5 *Geo.*, 576; 1 *Barb.*, 316; 7 *Johns. Ch. R.*, 315; *Coulson v. Harris*, 43 *Miss.*, 756; 1 *Johns. Ch. R.*, 49; 3 *English*, 52; 16 *Ohio*, 28; 7 *B. Monroe*, 289; *Ammons et al. v. Whitehead et al.*, 31 *Miss.*, 103; *Carr v. Anderson*, 24 *ib.*, 188; 8 *B. Monroe*, 519; *Bell et al. v. Tombigbee R. R. Co.*, 4 *S. & M.*, 573; *Planters' Bank v. Neeley et al.*, *ib.*, 113; 6 *How.*, 352; 2 *S. & M.*, 339; 12 *ib.*, 533.

3. That the court erred in allowing appellee to amend his bill, after motion to dissolve on bill and answer had been heard and overruled, without exceptions to the answer as insufficient and without affidavit that such amendments had become necessary by the disclosures made by the answer, and that he was ignorant of such facts, etc., until the coming in of the answer. 1 *Eden on Inj.*, 148, and notes 1 and 2.

4. That as it is only sureties, who pay the debt of their principal, as a matter of right are subrogated, the court erred to the



---

Opinion of the court.

---

prejudice of appellants in allowing the wife of appellee to be made a party to the suit. 2 Paige, 117; 8 Leigh., 588; 5 S. & M., 791.

*Thrasher & Sillers*, for appellee, insisted:

1. That a bill in equity was the proper remedy to prevent or remove clouds from title to real estate. *Coulson v. Harris*, 43 Miss., 752; *Ezelle v. Parker*, 41 ib., 526; 2 Story's Eq. Jur., § 851; *South. Law Review* for Jan., 1874, p. 126; 60 Maine, 186; *McDonald v. Murphree*, 45 Miss., 711; *Dows v. City of Chicago*, 11 Wall., 108.

2. That appellee had no adequate remedy at law; that nothing could compensate one for a cloud being placed upon their title.

3. That appellee had fulfilled all the requirements of the law to entitle him to his homestead exemption. *Trotter v. Dobbs et ux.*, 38 Miss., 198; *Moseley v. Anderson*, 40 ib., 54; *Stephenson v. Osborne*, 41 ib., 127.

SIMRALL, J., delivered the opinion of the court.

Two points have been made and argued in this court, in opposition to the decree of the chancery court.

First. That Lewis, the appellee, did not have a homestead exemption in the premises levied upon by the judgment creditors, the appellants.

Second. That a court of chancery had no jurisdiction; by its restraining process, to prevent the sale of the property under the executions, the remedy being adequate at law.

The case, as made by the pleadings and proofs at the final hearing, was that Lewis, with his wife and servants, was occupying the house and lot, in the suburbs of Port Gibson, estimated to be worth from twelve to twenty hundred dollars.

The argument made in behalf of the judgment creditors is, that at the date of the rendition of the judgments, and for some time after, there were liens upon the property, because Lewis was not, within the meaning of the statute, a householder and head of a

---

Opinion of the court.

---

family, and his subsequent marriage could not have the effect of divesting the liens.

Two things are necessary in order to consummate the right to the homestead. First, occupancy as a place of residence; second, by the head of a family and householder. If the debtor fulfills these conditions, then the premises, to the extent of quantity and value named in the statute, is exempt from "seizure" and "sale." The law attaches to the ownership of the debtor that immunity. The privilege is both against seizure and sale. Although, therefore, the property might have been liable to levy and sale at the date of rendition of judgment, yet, if before either a levy or sale, the property is impressed with the rights of a homestead, the creditor can proceed no further. The very point was adjudged in *Trotter v. Dobbs and wife*, 38 Miss., 198. Dobbs had occupied the land for twelve months before the levy and sale; but on the morning of the day of sale, and a few hours in advance of it, he married and took his wife home. It was held, that the moment he had married he became the head of a family, and, being an occupant, the land became exempt for his benefit, and the support of his family. The doctrine is distinctly announced, that, if the debtor occupies as housekeeper and head of a family before the sale, however short the time, he is entitled to the privilege conferred by the statute.

Lewis has completely fulfilled these requisites, and the privilege of exemption has been impressed upon the land as a homestead. *Phipps v. Lessley*, 49 Miss., 798.

We have not met with a case disputing or denying to the chancery court the power to intervene and prevent the sale of real estate, on legal process; on the allegation that such a proceeding would culminate in casting a cloud upon the title of the complainant. Numerous cases have been decided in this court, without challenging the jurisdiction, one at this term of *Mary A. Shaw v. Valencia Millsaps, et al.*, (*post*, 380.)

The levy upon the property is one link in the chain of acts, to

---

Opinion of the court.

---

bring about such a result. It is the assertion of a claim, upon the property by the judgment creditor, which would embarrass the complainant's title.

In *Dows v. City of Chicago*, 11 Wallace, 110, the court in considering the various circumstances, in which the enforcement of taxes may be restrained by injunction, mentions the proposed "sale of real estate, which would throw a cloud upon the complainant's title, before the aid of a court of equity can be invoked." It rests upon the principle, that if the tax be illegal or improper, the law could afford no adequate redress; but the chancery court will intervene in the first instance in the protection of the complainant's title. The principle is recognized in *McDonald v. Murphree*, 45 Miss. 711.

If the real estate is not subject to sale under legal process, no title would pass to the purchaser. Nevertheless, there would be hanging over the complainant's title, the sheriff's deed, the judgment and levy, which in their united effect would constitute a cloud, that might, after the lapse of time, seriously jeopardize the complainant's right. It would not be denied that after the sale the complainant might bring his bill to set aside the sheriff's deed. Within the liberal and beneficent range of equitable power—if the remedy at law would not be full and complete practically—then the chancery relief may be interposed.

The test of the right to equitable interposition is not merely that there is a remedy at law; "but it must be plain and adequate, as practical and efficient to the ends of justice, and its prompt administration as the remedy in equity. *Boyce's Ex'rs v. Grundy*, 3 Peters, 210; *Watson v. Sutherland*, 5 Wallace, 78. In this last case, *Watson & Co.* caused writs of *fieri facias* issued on judgments recovered against *Wroth & Fullerton*, to be levied on the entire stock of a retail dry goods store, in the possession of *Sutherland*, who claimed to be exclusive owner. He charged if the sale were made, the injury would be irreparable, and could not be compensated in damages, because he was sole

---

Opinion of the court.

---

owner, had bought the goods for the season's business, which were not all paid for; that if his store was closed, a profitable trade would be broken up, and he would become insolvent, etc., etc. On these allegations, it was held a proper case for injunction.

What damages could a court of law award against a sheriff and the judgment creditor who prompted his act, for the levy upon and sale of land? The sheriff does not break the close; he does not intrude upon the occupancy; his deed is ineffectual to pass the title. It can hardly be affirmed that more than nominal damages have been sustained. Yet it might be true, that the existence of his deed would impair seriously the sale value of the property, and might in after years, when evidences have faded, or grown dim, put in jeopardy the complainant's title. Many cases are to be found in our books, of bills brought by judgment creditors to set aside fraudulent conveyances of the debtor, in order that a disincumbered title may be offered to purchasers, and thereby enhance the value of the property.

It would be admitted, if a sale were made under these executions, that Lewis could maintain a bill to vacate the sheriff's deed, as a cloud upon his title. It is giving a liberal and beneficial application of the principle, to interpose in advance of the sale, and disperse the gathering cloud before it has settled upon the complainant's title. To that extent, in administering the preventive justice of a court of equity, has the doctrine been long acted upon in this state. Nor is it peculiar, or special in our jurisprudence. In a very recent case, *Gerry v. Stimson*, 60 Me., 189, the court said, "the same reason which justifies the court to compel the cancellation of a deed, or the release of a supposed right under it, will authorize the prevention of such fictitious and fraudulent titles coming into existence.

It is better to prevent the creation of a fictitious or fraudulent title, than to compel its cancellation or release after it had been created." In that case the administrator was about to make a sale

---

 Syllabus.
 

---

of intestate's real estate, the effect of which would have been to embarrass the complainant's right, and was restrained by injunction.

The very question made in this case arose in *Pettit v. Shepherd*, 5 Paige Ch. Rep., 501. The object of the bill was to enjoin the sheriff's sale. The objection to the jurisdiction was urged that the complainant could not be injured, since the invalidity of the title conveyed by the sheriff's deed could be shown at law. But the chancellor held, that the power to cancel deeds was well established, and if the court can clear off such a cloud, "it would follow as a necessary consequence that it may interpose its aid to prevent such a shade from being cast upon the title, when the defendant evinces a fixed determination to proceed with the sale."

There is no error in the decree, wherefore it is affirmed.

---

 W. R. WOOD v. W. A. STAFFORD et al.

1. ESTATES OF DECEDENTS—WITNESSES—COMPETENCY THEREOF—CODE, 1871, § 758.—The construction put upon § 758 of the Code of 1871, is that a living party, plaintiff or defendant, in a suit in which the representative of a decedent is a party, is not competent to establish his right or demand against the estate, nor to defeat one, set up by the estate against him. *Lamar v. Williams*, 39 Miss., 347; *Faler v. Jordan*, 44 Miss., 239.
2. GUARDIAN—WARD—INVESTMENT OF FUNDS THEREOF.—If the money of a ward is invested in land or other property, the ward may follow the money into the land and elect to treat the land as held in trust for him, or if more to his advantage, can hold the guardian as his debtor for the money. *Pressly, Supt., v. Ellis et al.*, 48 Miss., 582. If the ward elects to take the money, the title to the property becomes absolute in the guardian.
3. SAME—MARRIAGE OF FEMALE GUARDIAN.—The husband of an executrix by virtue of his wife's appointment, may exercise the powers of an executor. *Edmonson v. Roberts*, 1 How., 329. Marriage with the administratrix confers the same duties and responsibilities. *Wren et al. v. Gayden*, 1 How., 376. The rule must be the same when the female guardian marries.

## Brief for appellant.

4. **SAME—INVESTMENT OF WARD'S MONEY BY HUSBAND OF FEMALE GUARDIAN.**—When the husband of a female guardian invests the money of his wife's ward in land, he becomes a volunteer, and if the ward should elect to proceed against the land, he would occupy no better position than would the guardian had she taken the title to herself. Courts of equity follow the ward's property, whenever wrongfully disposed of, and into whosoever hands it may come, that person will be charged as trustee, if it be shown that he had knowledge of the trust.
5. **SAME—POWER OF DISPOSITION IN GUARDIAN.**—When the right of disposition is in the guardian, and the purchaser or assignee is not obliged to see to the appropriation of the money, yet if upon the face of the assignment it was to pay a private debt, or for any other improper purpose, contrary to the duty of such fiduciary, a court of equity will relieve.
6. **SAME—SAME.**—If the trust funds have been invested in property, the *cestui que trust* may claim the beneficial interest in the property, or he may claim an equity upon the property for the money, and a vendee from such purchaser with notice stands as trustee. The trust can be enforced against all persons who come into possession of the property with notice of it. *Adair v. Schaw*, 1 Sch. & Lefr., 262.

APPEAL from the Chancery Court of Montgomery County.  
Hon. D. P. COFFEY, Chancellor.

The facts of the case sufficiently appear in the opinion of the court. The error complained of was the dismissing of the bill.

*Sweatman & Williamson*, for appellants, contended :

1. That Stafford, by virtue of his marital relation, was a trustee for the wards of his wife, and that in law he will be held to account as strictly as though he had been the actual guardian.

2. That is a well settled principle of law that the *cestui que trust*, or ward, can elect to recover from the trustee or guardian, either the money or the property that the money purchased. *Casslinger v. Stakes*, Meigs (Tenn.) R., 175.

3. That by the decisions of this state, the husband of an executrix and administratrix is liable with his wife for the use and application of the trust fund, so long as the coverture continues. This same principle will apply to the husband of a guardian. *Edmonson v. Roberts*, 1 How. (Miss.), 322; 2 Williams on Ex., p. 825.

---

Opinion of the court.

---

*D. A. Holman*, for appellee, insisted :

1. That Whittle's deposition is clearly inadmissible, because he shows he owed the guardian \$1,000, and seeks to get a credit on his note and charge either the guardian, who is dead, or Stafford, who is dead, by his own, both unassisted or corroborated by any other testimony. Code of 1871, § 768; 29 Miss., 161; 35 Miss., 584; 28 Miss., 119.

2. That when Whittle borrowed the money, it became his own property, and not trust funds, and that the statute of limitations has barred the right to recover it.

3. That Stafford, by virtue of his marriage, could not or did not become guardian or trustee of his wife's wards. That the cases which establish the doctrine, that the husband of an executrix or administratrix, by virtue of his marriage, becomes trustee of the funds administered, do not recognize, much less establish, that the same relation exists between the husband and the wife, who is guardian.

4. That our statute recognizes this distinction by requiring the husband of the executrix and administratrix to give bond, and no such requisition is made upon the husband of a wife who is a guardian. Code of 1871, § 1122.

SIMRALL, J., delivered the opinion of the court.

Mrs. Williams, in 1858, was appointed guardian of her minor children; subsequently she married one Stafford. Before her marriage she had loaned to her father, of her wards' money, one thousand dollars. In 1858, Stafford, her husband, bought the land in controversy, and paid for it by crediting Mr. —, the vendor, with \$800, the price of it, on his note for the borrowed money. This purchase and mode of payment was with the consent of Mrs. Stafford, his wife.

The complainant, the surviving ward of Mrs. Stafford, brings this suit in equity, to recover the land, on the ground that the fiduciary fund was used in its purchase.

---

Opinion of the court.

---

The employment of the means of the ward in the purchase of the land was proved by Wm. Whittle, the debtor to the wards, and the vendor of Stafford. His competency is objected to. The construction put upon the proviso to art. 190, Code of 1857, p. 511; Code of 1871, § 758 is, that a living party plaintiff or defendant in a suit in which the representatives of a decedent is a party, is not competent to establish his right or demand against the estate, nor defeat one set up by the estate against him. *Lamar v. Williams*, 39 Miss, 347; *Griffin v. Lower*, 37 Miss, 458; *Faler v. Jourdan*, 44 Miss. 289; *Witherspoon v. Blewett*, 47 Miss., 575, 6. In this suit Whittle was not a party; nor was the personal representative of a decedent asserting a claim or demand against him; nor was there involved in it a claim for himself, which he was attempting to establish. He was therefore a competent witness.

The main question is, can the complainants pursue their fund, employed by the husband of their guardian in the purchase of the land, and take the land itself instead of the money?

It has been so often affirmed by the courts, that a guardian or other trustee cannot make gain or profit from the use of the funds of the ward or *cestui que trust*, that it has become a first principle. If the money is invested in land or other property, the ward or *cestui que trust*, may follow the money into the land, and elect to treat the land as held in trust for him, or if more to his benefit, he can hold the guardian or trustee as his debtor for the money. It is at his election to treat the land as beneficially his. 2 Kent's Com., 229; *Pressly, Supt., v. Ellis et al.*, 48 Miss., 582. If he elects to take the money, the title to the property becomes absolute in the guardian.

There could be no doubt if the purchase had been made by, and the title taken in the name of Mrs. Stafford, a court of equity would, at the suit of the complainants, enforce a conveyance to them.

But it is said, as the purchase was made by the husband, that principle does not obtain.



---

Opinion of the court.

---

As it regards the execution of the will, the husband of the executrix by virtue of his wife's appointment, may exercise the powers of an executor. *Edmondson v. Roberts*, 1 How., 329. Marriage with the administratrix confers the same duties and responsibilities. *Wren v. Gayden*, 1 How., 376. The rule must be the same when the female guardian marries.

By reason of the marriage, Stafford got control of the assets of these wards, and converted part of them into the land.

But if it were conceded, that the husband had no right to intermeddle with his wife's guardianship, and the wife applied the funds to pay for the land conveyed to the husband; in that case, the husband became the recipient of the land with knowledge that the funds of the wards had paid for it. He would be a volunteer; the beneficiary of a misappropriation of their means made with his knowledge and consent. If the ward should elect to proceed against the land, he would occupy no better position than would the guardian had she taken the title to herself.

Courts of equity follow the ward's property whenever wrongfully disposed of, and into whosever hands it may come, that person will be charged as trustee if it be shown that he had knowledge of the trust. Where the right of disposition is in the executor, administrator or guardian, and the purchaser or assignee is not bound to see to the appropriation of the money, yet, if upon the face of the assignment it was to pay a private debt or for any other improper purpose, contrary to the duty of such fiduciary, a court of equity will relieve. *Scott v. Tyler* (Dickens, 712); *Hill v. Simpson*, 7 Vesey, 158. The principle is very broad. If the trust funds have been invested in property the *cestui que trust* may claim the beneficial interest in the property or he may claim an equity upon the property for the money, and a vendee from such purchaser, with notice, stands in the shoes of his vendor as trustee. *Turner v. Street*, 2 Rand., 408. The trust can be enforced against all persons who come into possession of the property with notice of it. *Adair v. Shaw*, 1 Sch. & Lefr., 262.

---

Syllabus.

---

In this case Stafford got control of the fund as husband, and deliberately used, so as to divert it from the wards and vest it in himself by making the purchase for his own benefit.

Clearly, the beneficiaries have the right, if he made a good bargain, to insist that he took the legal title for their benefit, and thus prevent him from making personal gain out of their means.

We are of the opinion that the complainants are entitled to the relief sought by their bill.

The decree will be reversed, and cause remanded with directions to the chancellor to render a decree in favor of appellants.

---

**J. W. BOYKIN et al. v. THE STATE OF MISSISSIPPI.**

1. **BOND OF TAX COLLECTOR — FORM OF BOND NOT ESSENTIAL.** — Under the provisions of the Code of 1857, prescribing the form of official bonds, the act is declared to be directory only; and a failure to observe the form of the bond will not vitiate it, if it is sufficient in substance, and contains the proper conditions.
2. **PRACTICE — SUIT ON BOND OF TAX COLLECTOR, JUDGMENT BY DEFAULT.** — Suit may be maintained on the bond of a tax collector for money collected and not paid over; also for a failure to collect the taxes of his county. The Code of 1857, p. 521, provides that in actions of debt for a sum certain, and in actions founded on any instruments of writing, ascertaining the sum due or on an open account, \* \* \* if judgment be rendered by default, the clerk shall calculate the principal and interest and judgment shall be entered therefor. Under arts. 59, 60, 61, Code of 1857, these terms are used, "all taxes collected;" "the amount of taxes due the state," and "amount due by the collector," deducting all legal allowances. The allowances to be deducted include insolvencies, delinquencies, lands forfeited, etc., and this indicates the scope of the trial to determine the amount for which a defaulting tax collector shall be held liable to the state.
3. **SAME — SAME — WRIT OF INQUIRY.** — Suit was brought on the bond of Boykin as tax collector of Wayne county, for failure to collect and pay over to the state treasurer, the sum of \$845.18, a part of the state taxes of

---

Opinion of the court.

---

1869. Judgment by default was rendered against B. and his sureties on his official bond for the amount of the demand, and 30 per cent. damages: *held*, that the court should have awarded a writ of inquiry to ascertain the amount due to the state by the tax collector, after deducting all legal allowances.

ERROR to the Circuit Court of Wayne County. Hon. W. M. HANCOCK, Judge.

The facts in the case sufficiently appear in the opinion of the court.

The following is assigned for error :

1. The court erred in entering final judgment by default, without a writ of inquiry.
2. The action is under a statute, and not authorized by the statute.
3. The statute does not authorize this form of action for failure to collect taxes.
4. The tax collector's bond sued on is not a statutory bond, and no statutory action can be maintained on it.
5. It was error to assess damages without a writ of inquiry on the amount of taxes uncollected.
6. The judgment is excessive.

*S. Evans & S. A. D. Steele*, for plaintiffs in error, filed an elaborate brief, and Mr. Steele argued the case orally.

*G. E. Harris*, attorney general, for the state, filed a brief and argued the case orally.

TARBELL, J., delivered the opinion of the court.

This is an action on the bond of Boykin, as tax collector of Wayne county. The breach assigned is, that Boykin failed to collect and pay into the state treasury the sum of \$845.13, part of the assessment for 1869. Judgment by default was entered against Boykin and his sureties, for said sum of \$845.13, and damages at the rate of 30 per cent. per annum thereon, making a total of \$1,549. From this judgment a writ of error was prose-

---

Opinion of the court.

---

ented, and the following grounds are alleged as cause for reversal : "1. Final judgment by default, without a writ of inquiry ; 2. The action is under a statute, and is not authorized by the statute ; 3. The statute does not authorize this form of action for failure to collect taxes ; 4. The tax collector's bond sued on is not a statutory bond, and no statutory action can be maintained on it ; 5. It was error to assess damages on the amount of taxes uncollected, without a writ of inquiry, and 6. The judgment is excessive."

The declaration alleges that Boykin was appointed sheriff and *ex-officio* tax collector in 1869, by the then military governor of the state ; that the assessment roll was placed in his hands Nov. 1st of that year ; that the total of tax was \$1,212.30, of which he failed to collect and pay into the state treasury \$845.13, for which sum, with damages at the rate of 30 per cent. per annum, judgment was demanded. A copy of the bond was filed with the declaration, and was substantially set out therein. There was also filed a certified statement of the auditor, under art. 60, p. 85, Code of 1857, showing the indebtedness of Boykin to have been, on June 1, 1870, \$845.13.

The defendants in the action did not appear, and judgment by default was entered, without the aid of a jury, as above stated.

This action accrued under the Code of 1857. Art. 59, p. 85, requires tax collectors to pay over "all taxes collected for the state or county, to the state or county treasurer, within thirty days after the first of June in every year, and if any collector shall fail to do so, he shall pay damages at the rate of thirty per centum per annum thereon, from the time the same shall be due until paid, to be calculated from the first day of June."

And it is provided by art. 60, that "if any collector shall fail to pay into the state treasury the amount of taxes due the state, within the time prescribed, the auditor shall immediately notify the district attorney of the proper district, and shall furnish him a statement, under his hand and seal of office, of the amount due by such collector, and the district attorney shall forthwith com-

---

Opinion of the court.

---

mence suit on the bond of the collector for the amount due, of which the statement certified by the auditor shall be competent evidence."

It is further provided by art. 61, that "such suit shall be tried at the return term, and shall have precedence over all other civil causes, and judgment shall be given for the amount due by the collector, with thirty per centum per annum damages, as aforesaid, after deducting all legal allowances to which he may be entitled."

The condition of the bond sued on is as follows:

"The condition of this obligation is such that if the said J. W. Boykin shall faithfully perform all the duties of the said office of tax collector, and all the acts and things required by law or incident to the said office during his continuance therein, then the obligation to be void; otherwise to remain in full force and virtue." This bond was executed July 26, 1869. It recites the appointment of Boykin by the military governor of the state, July 2, 1869, and is made payable to the state of Mississippi.

A form of official bond is given in art. 186, p. 136, Code of 1857, to which the one in the record before us substantially conforms, but the same article declares that this provision "shall be considered as directory only, and a failure to observe the form herein prescribed shall not vitiate any official bond; and all official bonds shall be valid and binding, in whatever form they may be taken, except so far as they may be conditioned for the performance of acts in violation of the laws or policy of the state."

With reference to judgments by default and writs of inquiry, the Code of 1857, p. 521, art. 253, makes this provision: "In actions of debt for a sum certain, and in actions founded on any instrument of writing ascertaining the sum due, or on open account, where a copy of the account is filed with the declaration, if judgment be rendered on demurrer, by confession, or by default for want of appearance or plea, the clerk shall calculate the amount due for principal and interest, and judgment shall be en-

---

Opinion of the court.

---

tered therefor; and such judgment shall be final on the last day of the term, if not set aside. And in all actions when the sum due does not appear as aforesaid, and in all actions sounding in damages, if the defendant do not appear and plead according to law, interlocutory judgments may be taken, on which writs of inquiry shall be awarded, which may be executed at the same term, by the jurors attending said court, and executions may issue for the damages assessed by the jury and costs of suit, as in other cases."

Is the declaration, taken in connection with the statement of the auditor for a sum certain, and hence was a writ of inquiry unnecessary?

Under arts. 59, 60 and 61 of the Code of 1857, above referred to, can the action be maintained for the taxes uncollected, or must it proceed only for the taxes collected and not paid over? Art. 59 uses the term "all taxes collected;" art. 60, "the amount of taxes due the state;" and art. 61 says, "judgment shall be given for the amount due by the collector, with thirty per cent. per annum damages, as aforesaid, after deducting all legal allowances to which he may be entitled."

"Allowances" to be deducted include insolvencies and delinquencies, taxes on lands forfeited to the state, etc., and this indicates the scope of the trial, and the probable meaning of the terms used in arts. 59, 60 and 61, as to the sum for which claim can be made against a defaulting tax collector, on the facts as in the case at bar. In other words, is this a statutory action on a statutory bond? Or, for taxes uncollected, must the action be at common law for the neglect? These questions are propounded and discussed by counsel at some length. Without going over the argument, we will simply state conclusions reached. We construe the several provisions of the code referred to, together and liberally, in the interest of the public. The "amount of taxes due the state," from the collector was, in the first instance, the total of the state tax charged to him by the auditor. The

---

Syllabus.

---

statement of the latter, however, shows payments, and hence, the balance is the "amount due by the collector." For this sum judgment should be given, with thirty per cent. per annum damages, according to the foregoing provisions of the code, "after deducting all legal allowances," to which the collector "may be entitled." These "allowances" and the mode of obtaining them are fixed by law. Code of 1857, art. 42, p. 81; art. 44, p. 82; arts. 55, 56, 57, pp. 84, 85, and perhaps others.

Judgment reversed, writ of inquiry awarded here, and cause remanded.

---

## MARY A. SHAW et al. v. VALENCIA MILLSAPS et al.

1. **FRAUDULENT CONVEYANCES — EFFECT THEREOF.** — A conveyance made to delay, hinder, or defraud, is only void as to creditors. As to them the title is still in the grantor for the purposes of paying debts. It is good as against the grantor and his heirs.
2. **SAME — BILL TO CANCEL — NECESSARY PARTIES.** — The authorities are not agreed as to whether the liens of a fraudulent grantor are necessary parties to a bill to cancel a fraudulent conveyance. *Smith v. Grimm*, 26 Penn. St., 95. *Gaylord v. Kelshaw*, 1 Wallace, 81. Where an answer to a bill is made a cross bill, and asks for the cancellation of a deed, the complainants in the cross bill must confine it to the parties in the original bill. New parties cannot be introduced in a cross bill.
3. **SAME — CASE IN JUDGMENT.** — M., having a decree against S., was proceeding to sell her land levied upon, when she was enjoined by M. S., who claimed the land by virtue of a conveyance to her from W., trustee, etc., made before the decree was rendered against S. Pending the injunction, S. died. Upon the final hearing M. made her answer a cross bill, and in it prayed for the cancellation of the deed to M. S., as fraudulent. A decree was rendered accordingly. *Held*, that this decree was erroneous, as the proper parties were not before the court to warrant it in cancelling the deed; but the decree should have been, dissolving the injunction and allowing the land to be sold under the former decree.

APPEAL from the Chancery Court of Jefferson County. Hon. JAMES M. ELLIS, Chancellor.

---

Statement of case.

---

Upon the final settlement of the guardian account of Mary Shaw, as guardian of Valencia Millsaps, rendered after her marriage with Horace Millsaps, she was found indebted to her ward in the sum of \$2,336.09, for which sum a decree of the probate court of Jefferson county was rendered at the February term, 1869; a *ven. exponas* was issued for the sale of certain lands on the 20th of August, 1870, and 1,100 acres of land was advertised to be sold on the first Monday of October, 1870. Mary Ann Shaw filed her bill, joined by her husband, Wm. Shaw, for conformity, setting out the above facts, and that the land levied on was to the extent of 860 acres, her land having been purchased by her, in 1868, at a trust sale made by J. J. Warren, as trustee in a deed made by Mary Shaw (the defendant in the judgment of Valencia Millsaps) to J. J. Warren, trustee to secure Wm. Shaw a debt of \$9,830. At the sale under this trust deed, Mary Ann Shaw, the appellant, purchased 860 acres of the 1,100 included in the trust deed to Warren, and Warren conveyed to her. Valencia Millsaps, her husband and the sheriff, were made defendants, and an injunction asked to restrain the sale of the land as belonging to Mary Ann Shaw, and not the land of Mary Shaw, the defendant in execution. This bill was subsequently amended, stating that Mary Shaw had died, and one William Shaw was her administrator, and also alleging the probate decree against Mary Shaw, in her life time, had never been enrolled, and was no lien upon the land under which they were seeking to sell it, and that no one but the administrator could sell it, if subject to sale at all, without the heirs or administrator of Mary Shaw, deceased, the judgment debtor to Valencia Millsaps, and the grantor in the deed to J. J. Warren, trustee, being made parties, either complainants or defendants in the suit, or making Warren, trustee, a party.

Valencia Millsaps and husband answered this bill of injunction, making their answer a cross bill against Mary Ann Shaw, and charging fraud in the execution of the trust deed of Mary Shaw, deceased, to J. J. Warren, trustee, and also fraud in the sale from



---

Brief for appellants.

---

Warren to Mary Ann Shaw. To this cross bill appellants filed their answer, denying the fraud, and setting up a demurrer, general and special, for want of proper parties to justify the relief prayed for in the cross bill.

The decree declared the deed in trust from Mary Shaw to Warren, as trustee, to secure the debt of William Shaw, to be fraudulent, and to be cancelled, and the injunction to be dissolved. From which decree an appeal was taken, and the following errors complained of.

1. The court erred in overruling the demurrer of appellants to the cross bill of appellees, for want of the necessary parties thereto, as preventing the court from granting the relief prayed for therein.

2. The court erred in rendering a final decree dissolving the injunction and declaring the deed from Mary Shaw to J. J. Warren, trustee, and the deed from Warren to appellant void, for fraud, without the grantor in each deed, and the grantee in the first being parties to the proceeding, and without the administrator and heirs of Mary Shaw, deceased, being parties to said proceeding.

*Hiram Cassedy, Sr.*, for appellants, insisted :

1. That the merits of the question as to the deeds could not be properly investigated for want of the proper parties to the cross bill, and from the fact that this issue was presented on a cross bill, the necessary parties could not be made owing to the restrictions thrown around proceedings by cross bill as to new parties, other than those to the original bill. The general rule in equity as to parties is, that all persons who are interested in the object of the bill are necessary parties. Story's Eq. Pl., § 77; *Snodgrass v. Andrew et al.*, 30 Miss., 472; *Butler v. Spann*, 27 ib., 234; *Lovejoy v. Irelan*, 17 Md., 526; *Gaylord v. Kelshaw*, 1 Wallace, 81; *Bump on Fraud. Convey.*, 522. And as the necessary parties were not and could not, in this proceeding be brought before the court, the demurrer should have been sustained, and the injunction made perpetual.

*W. F. Mellen*, for appellees, contended :

---

Opinion of the court.

---

1. That by the general rules of chancery, a defendant has no right to make new parties to the suit by his cross bill. *Ladner v. Ogden*, 31 Miss., 332.

2. That the court has a right to decree that new parties be introduced as often as it is discovered that they are interested in the suit. *Carman v. Watson*, 1 How., 333. And such a decree will be presumed correct. *Pass v. McRea et al.*, 36 Miss., 143. That if the complainant desires that certain parties, having interest in the suit be made parties, that desire can be gratified by an amendment to the bill of complaint. If necessary parties, the original bill ought to have made them parties. This is a prerogative which complainants can always resort to, and so protect themselves should it in any case become necessary to introduce new parties for their protection.

3. If there is any error in the decree, it is not an error of which the appellants can complain, or one that can do them any harm or injury. Those in interest, who were not parties to the suit, do not have their rights affected by the decree.

SIMRALL, J., delivered the opinion of the court.

On final settlement of her guardianship accounts with her ward, *Valentia Millsaps*, *Mary Shaw*, her guardian, was adjudged to pay her \$2,536.09.

Execution issued upon that decree, and was levied upon the lands in controversy. The sale was arrested at the suit of *Mrs. Mary A. Shaw* (whose husband joined her for conformity), by injunction. She claimed to be the owner of the property, and deraigned her title through a conveyance made by *Mary Shaw* to one *Warren* in trust, to sell on nonpayment of a debt of about \$9,000 from herself to *Wm. Shaw*, and a sale and conveyance by the trustee to *Mary A. Shaw*, complainant.

*Mrs. Millsaps* and her husband, in their answer to the bill setting up the foregoing facts, impeach both the deed in trust to *Warren*, and his conveyance to *Mary A. Shaw* as executed in fraud

---

Opinion of the court.

---

and covin, with intent to hinder, delay, and altogether defeat Mrs. Millsaps in the collection of her debt against Mrs. Mary Shaw. The answer was made a cross bill, and concluded, among other things, with a prayer for setting aside and canceling these conveyances as obstructions in the way of fully reaping the benefits of the probate decree.

At the final hearing, that relief was granted.

In the progress of the suit Mrs. Mary Shaw died. It was assigned for cause of demurrer, by defendants, to the amended bill, that the personal representative and the heirs of Mary Shaw, deceased, had not been made parties. The names of the latter were given in one of the depositions.

The question, and the only one seriously urged by the appellants is, that it was error to set aside and annul the conveyances when the personal representatives and heirs of Mrs. Mary Shaw were not parties to the cross bill.

Mary Ann Shaw claimed title as purchaser at the trust sale. It is hardly controverted by the appellants that the trust deed, and the conveyance to Mary Ann Shaw are fraudulent as to Mrs. Millsaps. If that be so, a decree dissolving the injunction and turning loose the execution, manifestly would have been right and proper. But Mrs. Millsaps, by her cross bill, sought affirmative relief, viz: the cancellation of the deeds, as casting a shade and suspicion over the title that might be passed at the sheriff's sale under her decree.

It has always been held under the statute of frauds, that a deceitful and erroneous conveyance was *only* void as against the creditor \* \* \* whose debt thereby might be disturbed, hindered or defrauded. Such is the fair intendment of the words of the statute. It is good as against the grantor, and vests the estate in the grantee, subject, however, to be defeated by the creditor or other persons injured thereby, and by him or them "only." It is good against the heirs of the grantor.

The authorities are not agreed as to whether the heirs of the

---

Opinion of the court.

---

fraudulent grantor are necessary parties. In *Smith v. Grim*, 26 Penn. St., 95, it was held they were not, because they had no interest in the property. But in *Gaylord v. Kelshaw*, 1 Wallace, 95, it was ruled that the fraudulent grantor was a necessary party, and such was also the ruling in 17 Md., 526; *Lovejoy v. Irelan*; *Beardsley Scythe Co. v. Foster*, 36 N. Y., 566; *Lawrence v. Bank of Republic*, 35 N. Y., 324. But there is this further difficulty. The complainants in the cross bill must confine it to the parties to the original bill; new parties cannot be introduced.

The parties defendants to the original bill, are Valencia Millsaps and her husband, the sheriff of Jefferson county, and Thos. Reed, the attorney for Millsaps and wife.

Under the practice, no other parties could be made defendants to the cross bill except the complainants and codefendants. It was not necessary that Mary Ann Shaw and husband should, in order to procure the relief they insisted upon, make any other persons defendants, than Mrs. Millsaps and her husband. These defendants could have successfully defeated the relief sought by proof that the conveyances to her were fraudulent. There is no doubt upon the authorities, that if Mrs. Millsaps had gone into chancery in aid of her execution, after she had made the levy, to displace these deeds as fraudulent, that the fraudulent grantor would have been a necessary party. To obtain such relief Mary Shaw and Warren, trustee, were necessary parties, especially the former. But Mrs. Millsaps did not, in the first instance, invoke that sort of equitable aid, but was proceeding to sell the land under her process, which would have left the question of the fraudulency of the deeds, to have been litigated between the purchaser and Mary Ann Shaw. The question was to have been left open to investigation, in an ejectment by the purchaser, and if the fraud were established, would as effectually have defeated Mrs. Shaw's title, as if litigated in chancery to avoid the deeds. The statute having denounced utter "voidness" of a fraudulent deed, the title is esteemed as remaining with the grantor, for the purpose of paying

---

Syllabus.

---

his debts. So that a sale of the property under the execution would have passed a good title, quite as available as though the fraudulent deeds had not been executed. But in the state of the pleadings, Mrs. Millsaps could not make her answer a cross bill for the purposes of cancellation, because she could not make Mrs. Mary Shaw a party defendant, she not having been a party to the original bill; nor was it necessary that she should have been. Such also was the case with respect to Warren, trustee.

We think, however, that the Chancellor might have declared in his decree, that because the deeds under which Mrs. Mary Ann Shaw claimed the property were tainted with fraud, she had failed to establish her right to the property against Mrs. Millsaps, a creditor of Mary Shaw, have dissolved the injunction and dismissed the bill.

The pleadings were not in that condition as to parties which warranted decree as rendered. The necessary parties to warrant a decree of cancellation were not before the court, nor under the practice, could they have been made defendants to the cross bill.

So much of the decree as directs a cancellation of the deeds will be reversed, and in lieu thereof a decree may be rendered in this court dissolving the injunction, and allowing a sale under process in the probate decree. Appellants to recover costs in this court, but to be taxed with costs in chancery court.

---

A. A. SHATTUCK, use etc. v. JOHN N. MILLER.

1. PRACTICE—BOND OF INDEMNITY—DAMAGES—HOW RECOVERED.—Where a bond is executed by the plaintiff in execution to indemnify the sheriff against any damage that may accrue to the claimant, the remedy to recover damages sustained by reason of the levy, is on the bond of indemnity, and not in the claimant's issue. Where a levy is made upon personal property, which is claimed by another, who presents an issue to try the right of property, that issue does not involve the ques-

---

Brief for plaintiff.

---

tion of damages, nor does it preclude the plaintiff from a resort to the bond of indemnity to the sheriff for damages resulting from the unlawful levy upon the goods.

2. SAME — SAME — SUIT ON THE BOND — PARTIES. — The bond of indemnity imputes to the obligors of the bond the entire responsibility which rested at the common law, upon the sheriff for an illegal levy upon personal property, and is in substitution and bar of a suit against the sheriff, unless the obligors shall be or become insolvent, or the bond would be otherwise invalid, and suit may be brought and maintained against any one or more of the parties on any bond. The justice's court has jurisdiction to render judgment on the bond to the amount of \$150, though the bond may be for a larger sum.

ERROR to the Circuit Court of Colfax County. Hon. J. A. ORR, Judge.

P. H. Pepper & Co., recovered a judgment against Joseph Jacobson, execution was levied on personal property claimed by C. Jacobson, wife of defendant, who gave bond and took possession of the property. Issue was presented, the right of the property tried and judgment for claimant. In the time of the levy, the sheriff had taken a bond to indemnify, with J. N. Miller as surety.

After the case was decided in the circuit court, the claimant, C. Jacobson, brought suit in the justice's court, on the bond of indemnity, for damages resulting from the seizure of the property. The justice of the peace dismissed as to Pepper and rendered a judgment against Miller, the surety, for \$65. Miller appealed to the circuit court, there moved to dismiss, the court sustained the motion and dismissed the cause, and it comes to this court upon writ of error.

*Beckett & Little*, for plaintiff in error :

1. The defendant's first ground in his motion to dismiss on account of previous adjudication, is we think settled in *Colby v. Yates*, lately decided at the October (special) term 1873 of the supreme court of Tennessee, at Jackson, Tenn. The court there say that in replevin, the suit as to detention, being decided without

---

Brief for plaintiff.

---

reference to the damages, a separate action may afterwards be brought for the damages. This claimant's issue is similar in nature to replevin and *detinue*, and under Rev. Code of 1871, sec. 845, a separate action is perhaps the appropriate remedy.

2. Defendant's second ground, that suit is dismissed as to principal on the indemnifying bond, and prosecuted against surety, is we think, rendered untenable by *Lillard v. The Planters Bank*, 8 How. R., 78; *S. P. Pool v. C. & A. S. Mill et ux*, 44 Miss R., 306; and *Wilkinson et al. v. Flowers et al.*, 8 Geo., 579.

3. There is a more serious question not raised in defendant's motion, viz: That the penalty of the bond put in suit exceeds \$150. Our state constitution, art. 6, sec. 14, expressly confines the jurisdiction of circuit courts in civil cases to causes where the principal amount in controversy exceeds \$150. Rev. Code 1871, sec. 1302, gives justices jurisdiction of actions for the recovery of damages, where the amount of demand does not exceed \$150. Sections 844 and 845 contemplate that the plaintiff shall recover the damages sustained by him without reference to the penalty of the bond. Plaintiff fixes the amount actually in controversy by his pleadings and bill of particulars, and the objection should not come from defendant, that plaintiff claims too little. If the penalty of the bond fixed the jurisdiction, such bonds might be taken for each \$150 or less, and the justice courts deciding without reference to the penalty, might render judgments for amounts largely exceeding \$150, and the circuit courts, on the other hand, for amounts falling far below their constitutional jurisdiction, thus invading each the province of the other on technicalities, and in the latter case, at enormous and unnecessary expense for small amounts. These bonds are intended to cover the value of the property as well as damages for its detention, and we think sec. 666, Rev. Code 1871, only applies where the full amount of the penalty is claimed and in controversy, else it would conflict with art. 6, sec. 14 of the constitution, and also compel litigants to allege amounts not just and not claimed.

---

Brief for defendant.

---

4. The circuit court should have dismissed defendant's appeal, as the penalty of his appeal bond was only \$130 instead of \$.00, as required by law. Rev. Code 1871, sec. 1332.

*Barry & Brown*, for defendant in error:

There are three questions presented in the case. 1. Was it proper to dismiss, as to the principal in the bond, and proceed against the surety? 2. As the penalty of the indemnifying bond was over \$150, did the justice's court have jurisdiction? 3. After the trial of the matter in the circuit court on the claimant's issue, was it not *res adjudicata*, and was it competent to prosecute another suit for damages?

1. We refer to the record, in which no excuse is given for dismissing the suit as to the principal. The presumption is that the obligors resided in Colfax county, where the bond was executed. In the justice's court the pleadings are oral. If the principal was living and within the jurisdiction of the court, the surety could not be sued alone. The action of the court below is presumed to be correct. *Grant v. Planters' B'k*, 4 How., 326; *Long v. Shackleford*, 3 Cush., 559; *Steadman v. Holman*, 4 George, 550; 44 Miss., 413.

2. Section 845, Code 1871, authorizes a suit on such a bond in any court having jurisdiction; and gives such damages as he may sustain, whether the same shall extend to the penalty or not. The language of this section does not support plaintiff's position. Under this section the justice had no jurisdiction, as the bond exceeded \$150, and we know of no statute that changes the well known rule.

3. We insist that the decision in the claimant's case was an adjudication of the matter, whether damages were claimed in that trial or not. The bond is conditioned to indemnify the sheriff, and pay any person claiming the property any damages they may sustain.

Section 861, Code 1871, that such trial shall be "governed by the same rules which regulate and govern the trial of an issue in an



---

Opinion of the court.

---

*action of detinue*; again, the final judgment on any such issue shall have the *like effect* on the rights of the parties thereto, as if the same had been given in an action of *detinue*. In *detinue* the judgment is in the alternative that the plaintiff recover the goods, or the value thereof, if he cannot have the goods, *and his damages*. 2 Humph., 59; 3 B. Mon., 313; Dana, 58; Tidd's Practice, 931.

For the doctrine of former adjudication, see *Agnew v. McElroy*, 10 S. & M., 552; *Johnson v. White*, 13 S. & M., 584.

The objection to the bond is raised here for the first time. That is too late. *Russell v. Knowles*, 4 How., 90; *Dixon v. Doe*, 1 Cush., 84; *Hatch v. Roberts*, 41 Miss., 92.

SIMRALL, J., delivered the opinion of the court.

A bond of indemnity had been given to the sheriff, who had levied on personal property which was claimed by Mrs. Jacobson. Upon trial of the claimant's issue, the verdict and judgment was in her favor.

She and her husband then brought suit before the justice of the peace, on the indemnifying bond given to the sheriff (which was in the penalty of \$500), for the illegal levy on her property, and damages for its detention. She recovered sixty-five dollars. The defendant appealed to the circuit court. A motion had been made by Miller, the defendant, in the justice's court, to dismiss the suit, because the plaintiff had discontinued as to Pepper, the principal, and because the plaintiff should have proved his damages in the circuit court.

In the circuit court, Miller, the appellant, renewed the motion, on substantially the same grounds.

First. Because it appears from the record and proceedings in the cause, that the same has been previously adjudicated.

Second. Because the suit had been dismissed as to the principal:

This motion was sustained, and the judgment was, that Miller, the appellant, go hence, etc., and recover his costs.

The question proposed to be made in the first ground of the

---

Opinion of the court.

---

motion, and which has been discussed by counsel is, that if any damages accrued to the claimant by reason of the levy upon her property, that was involved in the trial of the claimant's issue, and if not insisted upon and allowed in that suit, the claimant is thereby concluded and cut off from a remedy in the bond of indemnity to the sheriff.

To determine whether a particular matter has been concluded by a former adjudication, the inquiry is, whether it was involved, or could have been, if insisted upon in the former suit. If that suit included within its remedial power, the subject matter of the second suit, then it has become *res adjudicata*. For the law does not tolerate the splitting up of a cause of action, and a separate suit on the fragments. *Agnew v. McElroy*, 10 S. & M., 554, 5, 6; *Hitchin v. Campbell*, 2 Wm. Black, 830. If it was competent in the claimant's suit to consider of the illegal seizure and detention of Mrs. Jacobson's property, and to give compensatory damages therefor, then within the rule that adjudication becomes conclusive.

When the property has been claimed, and bond executed, the execution "to an amount equal to the value of the property" is stayed until a final decision of such claim. And upon subsequently issued executions, the clerk shall indorse "such estimated value for the government of the officer" (sheriff). § 859, code 1871. Section 861 directs that the trial of "such issue" shall be governed by the same rules that regulate the trial of an issue in *detinue*. The judgment shall have the like effect as in that action. If the jury find for the plaintiff in execution, they shall assess the true value of the property, and shall certify whether the claim was made for fraudulent purposes or for delay. The court shall render judgment for the property \* \* or its value as assessed by the jury, and costs; and the damages, by way of penalty, if the claim was fraudulently made. §§ 861, 862. Without further analysis of the statute, this is the fair result; being a specific remedy, unknown to the common law, it must be

---

Opinion of the court.

---

strictly followed. The purpose is in a speedy and simple mode, to try the single question, whether the property is liable to the judgment and execution; if that issue is decided for the plaintiff in execution, then he gets a judgment for the property, or its value and costs; if for the claimant who has already replevied the property, the judgment is that he go hence without day and recover his costs.

It is governed by the rules that regulate the action of *detinue*, as to the mode of trial and form of verdict and judgment. But there is not included in it, as in *detinue*, damages for the detention. The creditor has no title or interest in the property. It can not be affirmed that he has by virtue of any ownership taken the goods. He has done no more than to cause their seizure, as the defendant's property, in satisfaction of his judgment. In *detinue*, damages for the detention, may be as large in amount as the value of the thing, since they accrue from the beginning of the unlawful detention, and may run through several years. But the subject is regulated by statute, and we think that the cause of action of this suit was not involved in the claimant's issue, and the plaintiff is not precluded from a resort to the bond of indemnity to the sheriff, for damages, resulting from the unlawful levy upon her goods.

The second ground of the motion is the dismissal of the suit as to Pepper. The presumption is that it was proper so to do, if under any circumstances such action could have been proper. *Duncan v. McNeil*, 31 Miss., 706; *Pool v. Hill*, 44 Miss., 309. But suit may be brought against any one of the parties, on any bond, \* \* etc. Code 1871, § 2236. The next succeeding section requires suit to be joint against all parties to promissory notes and bills of exchange resident in this state."

The effect given by §§ 844, 845 of the Code, is to impute to the obligors of the bond of indemnity, the entire responsibility, which rested at the common law upon the sheriff, for an illegal levy upon personal property. Indeed the bond is in substitution

---

Opinion of the court.

---

and bar of a suit against the sheriff, "unless the obligors shall be or become insolvent, or unless the bond would be otherwise invalid." § 845 of Code. Since, therefore, Mrs. Jacobson could have sued the sheriff in trespass, for damages incident to the unlawful taking and detention of her goods, at the common law; the redress for the trespass is by the statute upon the bond. As we have seen, redress for the tortious act of the levy was not included in the claimant's issue, and it would follow that the remedy was a suit upon the bond.

The question was not made in the circuit court, though pressed in this court, of the want of jurisdiction in the justice of the peace, because of the amount in controversy.

The amount in controversy is the principal of the sum *demand*ed.

Did Mrs. Jacobson claim of the defendant the \$500, the penalty of the bond, or was the sum really demanded — the \$150 — as damages for the tortious act of the sheriff?

The responsibility of the sheriff at common law, was for the injury inflicted by his trespass. In that sort of suit, the amount in controversy would have been the damages alleged to have been sustained, to wit, the \$150. The obligors covenant in effect, that they will stand in the shoes of the sheriff, and will pay to the claimant all the damages which the sheriff has incurred. Technically, it is an action of debt upon the bond for a breach of one of its conditions. That breach is shown by proof of the illegal levy and the amount recovered could only be the damages therefor.

We think, therefore, that the real demand made by the plaintiff was the \$150 damages, which sum is within the justice's jurisdiction.

But the point was not made in the circuit court, and we are not disposed to consider objections not made at *nisi prius*, if it can be avoided.

There was error in dismissing the appeal and annulling the judgment of the justice of the peace.

Judgment reversed, and cause remanded for a trial on the merits.

## Briefs.

## E. P. THOMPSON v. TOOMER &amp; SYKES.

1. CHANCERY COURT — PRACTICE — APPEAL. — An appeal from the chancery court should be allowed by the chancellor, in vacation or in term time, and not by the clerk. Rev. Code, 1871, § 1257. One of several parties in interest may prosecute an appeal from the chancery court. Rev. Code, 1871, § 1258. A bond for an appeal is sufficient if signed by one of several appellants. Rev. Code, 1871, § 1261. The allowance of an appeal by the clerk in the cases provided for by Rev. Code, 1871, §§ 1256-1257, is a nullity, and this being a matter of jurisdiction will be acted upon by this court whenever the fact comes to its knowledge. It makes no difference that this is not mentioned as a ground for this motion. Whether the justification of the sureties under Rev. Code, 1871, § 1253, should appear in the record sent here, *quare*?

APPEAL from the Chancery Court of Chickasaw County. Hon. A. POLLARD, Chancellor.

This was a bill filed in the chancery court of Chickasaw county, at the December term, 1873, by the creditors of J. Y. Thompson, deceased, in the nature of a bill of review, setting up the insolvency of the estate, and that the only property remaining was the real estate, set aside as exempt, and that the same was not at the time it was set aside, and has not been since, occupied by the minor heirs to whom it was set aside in 1870 as a homestead, and asking for a sale of the same to pay debts. Defendants filed a demurrer, which was by the court overruled, and the case comes to this court on appeal.

The following is assigned for error, to wit:

"The chancery court erred in overruling the demurrer of appellants, to the bill of appellees."

*Davis & McFarland*, for appellant:

It is believed that the case of *Hargroves v. Baskins*, MSS. opinion, is decisive of this question, and if so, this case must be reversed.

*J. N. Carlisle*, for appellees:

The demurrer is defective. Rev. Code, 1871, § 1018. It is

---

Opinion of the court.

---

not a bill of review. Code, 1871, §§ 976, 977 and 2160. The property was not exempt unless occupied; when abandoned it becomes subject to the payment of debts. Rev. Code, 1871, § 2144; Acts, 1867, p. 222; Acts, 1865, p. 137; Code, 1857, §§ 529 and 281; 39 Miss., 468; 45 Miss., 170. We have never had our day in court, and are not concluded by their *ex parte* decrees. 43 Miss., 140.

TARBELL, J., delivered the opinion of the court:

Motion to dismiss on the grounds following: 1. Want of sufficient bond on appeal; 2. Bond not signed by all the appellants, or, in fact, is signed by only one of the appellants; 3. No justification of the sureties on the appeal bond appears in the record.

For these reasons it is urged that the bond is void.

This is an appeal from a decree overruling a demurrer, which decree was rendered April 30, 1874. The petition for appeal is addressed to the clerk and dated June 26, 1874, in behalf of all the respondents.

The bond bears date, September 30, 1874, and is executed by one only of the several appellants, with two sureties. No evidence of the justification or responsibility of the sureties, or approval of the bond, is contained in the record. The bond is conditioned that the appeal shall operate as a *supersedeas*. It does not appear that the appeal was asked of or allowed by the chancellor. No objection is made to the allowance of the appeal by the clerk, or, rather, that the petition for the appeal was addressed to him. Its allowance is a matter of inference, only, from the execution of the bond, and the preparation and transmission of the record to this court.

Possibly, the mistake of counsel, in this case is, in construing § 1256 with previous sections of the code, whereas it should be construed in connection with § 1257. The appeal should have been allowed by the chancellor "in vacation or term time," but the application must have been made and the bond executed

---

Statement of case.

---

within twenty days after the decree overruling the demurrer. The allowance of an appeal by the clerk, in the cases provided for by §§ 1256 and 1257, is a nullity, and this being a matter of jurisdiction, will be acted upon by this court whenever the fact comes to its knowledge. It makes no difference that this is not mentioned as a ground for this motion.

One of several parties in interest may prosecute an appeal from the chancery courts, Code, § 1258, and bonds on appeal are sufficient if signed by one of the several appellants; § 1261. Whether the justification of the sureties under § 1253 should appear in the record sent here, *quere*?

As the appeal was not applied for and bond executed in accordance with the code, § 1257, the motion is sustained.

---

NEWMAN CAYCE, Trustee, etc., v. JACOB R. STOVALL

1. CHATTEL MORTGAGE—LIEN THEREOF—RULE AT COMMON LAW.—While the rule at common law was, that the chattel or thing mortgaged must be in existence at the time of the mortgage, yet there may be a pledge or hypothecation which will take effect in equity so soon as the chattel shall be acquired. The lien attaches to the thing when it comes *in esse* against the mortgagor and all persons asserting a claim thereto under him. A growing crop is subject to mortgage or sale under execution. A judgment subsequent in date is subordinate to an equitable mortgage.
2. JUDGMENTS—LIENS THEREOF ON AFTER-ACQUIRED PROPERTY.—The lien of a judgment attaches to after acquired property from the time it is acquired by the debtor, but does not relate back to the date of the judgment. The lien of all judgments in existence when the debtor obtains the property attaches alike. A judgment operates as a lien (if duly enrolled) from the date of its rendition upon all the property owned by the debtor at that time.
3. REPEAL OF STATUTES—AGRICULTURAL ACT OF FEB'Y, 1867.—Sec. 8 of the code of 1871, provides that "this code shall supersede and repeal all preexisting statutes of a general nature, the subjects of which are herein revised and consolidated. The act of Feb'y 17, 1873, for the encourage-

50	396
71	345
50	396
86	520

---

Brief for plaintiff.

---

ment of agriculture, introduced for the first time into our jurisprudence liens as defined in the 1st, 2d and 3d sections, so as to give a credit to those who produce agricultural products. The 4th and 5th sections give remedy by a special mode of suit. The 6th section, to make efficient the lien, exempts the growing crops from sale under execution. The subject matter of this statute is not revised or consolidated and is not repealed by § 8 of the code of 1871.

ERROR to the Circuit Court of Itawamba county. Hon. B. B. BOONE, Judge.

The facts of the case sufficiently appear in the opinion of the court.

The errors complained of are:

1. In permitting the execution read to the jury.
2. In giving the second charge asked for by defendant.
3. In overruling plaintiff's motion for a new trial.

*Finley & Cayce*, for plaintiff in error, contended:

1. That under the act of February 18, 1867, a growing crop is not subject to the lien of a judgment or execution, and that a sheriff or other officer is prohibited from selling under any process any crop while under cultivation, and before it is matured and gathered. Acts of 1867, p. 571; *Planters' Bank v. Walker*, 3 S. & M., 409.

2. That this act of 1867—February 18, 1871—is not repealed by § 8 of the Code of 1871. This section only repeals all preëxisting statutes of a general nature, the subjects of which are revised and consolidated in the Code of 1871, and the subject of this act is not revised or consolidated. That the legislature has twice distinctly recognized this act as unrepealed and in force, by the act of April 5, 1872, and by the act of October, 1873, when it was repealed.

3. That if the statute of February 18, 1867, was not repealed until October, 1873, then the judgment of Stovall had no lien on the growing crops of Christian in July, 1873, the time when the deed in trust was executed and filed for record. And the lien of the deed in trust beginning at the time it was filed for record, gave



---

Opinion of the court.

---

it a priority of lien, which priority could never afterwards be divested except by an act of the parties controlling the deed in trust.

*Clayton & Clayton* and *J. A. Brown*, for defendant in error, contended :

1. That the lien of a judgment enrolled subsequent to the Code of 1871, attaches to a growing crop. This is the general law, and the statute of 18th February, 1867, forbidding it, was repealed by § 8 of the Revised Code of 1871. *Planters' Bank v. Walker*, 3 S. & M., 421; *M. & O. R. R. Co. v. Weiner*, 49 Miss., 739.

2. That the lien of an enrolled judgment attaches to a crop, *eo instanti*, on its acquisition as property, relating back to the date of its enrollment, so as to cut out a trust deed, made by the debtor, subsequent to the enrollment of the judgment, and prior to the acquisition of the property. *Moody v. Harper*, 25 Miss., 494; *Jenkins v. Gowen*, 37 Miss., 446.

3. That under our statutes a mortgage of a cotton crop, not *in esse*, is valid, but the mortgage attaches to the cotton only when matured, relating back to the date of the execution of the mortgage, so as to cut out a judgment lien subsequent to that date; but will not cut out judgments prior to its execution. 19 Wall., 547. But by the act of 1867, the agricultural lien is made a *prior lien* and will cut out an older judgment lien, as to all cotton matured, after the enrollment of the agricultural lien. The Cayce instrument is a deed in trust or mortgage. It does not pretend to be an agricultural lien.

SIMRALL, J., delivered the opinion of the court.

The questions of law arise upon an agreed case.

On the 26th of July, 1873, Arenton Christian executed a deed of trust to Cayce, trustee, to secure a note of \$798.50, payable to M. C. Cummings, the first of November, 1873. The deed embraced all the cotton raised by Christian in that year. The trusts and conditions were those usual in such instruments.

---

Opinion of the court.

---

On the 7th of December, 1872, Jacob R. Stovall obtained a judgment, before a justice of the peace, against Christian for \$60.00, which was enrolled in the office of the circuit clerk on the 26th of July, 1873. In November, an execution on Stovall's judgment was levied on two bales of cotton, of the crop of 1873, which were bought at the sale by Stovall. Cayce then brought suit in replevin for the cotton.

For the plaintiff in error it is contended that the deed in trust is a superior lien. For the judgment creditor it is argued that the statute of 1867, "for the encouragement of agriculture," has been repealed by the Code of 1871, and that the lien of the judgment relates back to its date.

Independent of the statute referred to, the deed of trust is a valid security at the common law. The crop was then growing, and according to all the authorities, was the subject of sale, either by contract or under execution. *Planters' Bank v. Walker*, 3 S. & M., 421. *Evans v. Roberts*, 2 Bos. & Pul., 378. It is also the subject of a mortgage, which is *sub modo* a sale. 2 Hill. on Mort., 2 vol., pp. 414, 416, §§ 12 and 18. In *Sillers et ux v. Lester*, 48 Miss. Rep., 523, *et sequitur*, the cases were extensively reviewed, and the doctrine deduced from many of them, with approbation, was that whilst at law, the property or thing mortgaged, must be *in esse* at the time, yet there may be a pledge or hypothecation, which will take effect in equity so soon as the chattel shall be acquired or produced. In *Butt v. Ellitt*, 19 Wallace, 547, it was said by the court, "the mortgage clause in the contract of lease of the 15th of January, 1867, \* \* could not operate as a mortgage, because the crops to which it relates were not then in existence. The lien attached when the crops grew." The lien attaches to the thing when it comes *in esse* against the mortgagor, and all persons asserting a claim thereto, under him, either voluntarily, with notice or in bankruptcy. *Mitchell v. Winslow*, 2 Story Rep., 644. A judgment, subsequent in date, is subordinate to an equitable mortgage. *Finch v. Earl Winchelsia*, 1 P. Wm., 282; *De*

---

Opinion of the court.

---

laire v. Keenan, 8 Dessaus. Rep., 74. In the matter of Howe, 1 Paige Ch. Rep., 129, 130.

Such was the effect of the mortgage of subsequently acquired chattels, as recognized in courts of equity. We do not wish to be understood as having committed ourselves to the broad doctrine that a mortgage of chattels thereafter to be acquired is unlimited, and in all circumstances to be sustained.

Where the mortgagor is engaged in the business of buying and selling chattels as a merchant, we do not think that a mortgage of the goods and merchandise, to be *thereafter* from time to time brought into the store, ought to be upheld against third parties who have acquired rights as creditors, although the mortgage might be good as to the merchandise on hand at the time.

But a mortgage of all the mules on a certain plantation, or *such as may be brought* upon it for the purposes of farm use would be admissible, as held in 28 Miss., 525-8.

The same principle would apply to machinery in a foundry or manufacturing establishment, introduced to supply necessities of addition and of renewal, from decay, etc.

So, too, of the earnings of a vessel, as freight, on a voyage, or the product of oil or fish, got in a whaling expedition. These instances are referred to for illustration, and not by way of enumeration.

What are the rights under the judgment lien? The judgment was enrolled on the 11th of April; the deed of trust was recorded the 26th of July thereafter. If the judgment lien took effect upon the crop growing, it is older and superior to that of the deed of trust; and the sale of the two bales of cotton under it vested the title in Stovall. We have already remarked that a growing crop of cotton, or other annual products of cultivation, were subject to sale under execution. By an act passed in 1840, "it was made unlawful to sell by execution any crop of cotton or corn while the same was under cultivation, before matured and gathered." In construction of this statute, it was held, in *Planters' Bank v.*

---

Opinion of the court.

---

Walker, 3 S. & M., 421, that there was no lien upon the growing crop; that it attached only when matured and gathered. We have not been able to find that this statute was brought forward and incorporated in the code of 1857, nor do we find it in the code of 1871.

The 6th section of the act of 1867, p. 571, "for the encouragement of agriculture," is almost in words the same as the act of 1840, and if that act was in force in 1873, when the transactions out of which this litigation arose occurred, then there was no judgment lien upon the cotton until it was matured and gathered. But it has been argued that the statute of 1867 has been repealed by the code of 1871. That code supersedes and repeals "statutes of a general nature which are herein revised and consolidated." § 8, page 8, Code 1871. The statute for the encouragement of agriculture, introduces, for the first time, into our jurisprudence, liens defined in the first, second and third sections, so as to give a credit to those who cultivate and produce agricultural products, to procure the means necessary to do so. The fourth and fifth sections give remedy by a special mode of suit. The sixth section, in order, as far as practicable, to make efficient the lien, and to give confidence and assurance to those advancing the means, exempts the growing crop from sale under execution.

The subject matter of this statute — the special agricultural lien — is not revised or consolidated in the code. Where the general subject is pretermitted altogether, it would be a narrow interpretation to hold that some part of the statute is repealed by implication, which connects itself with the main subject matter, and which is germane to and in aid of it. That is the character of the 6th and 7th sections. The entire scope of the statute is to enable parties to pledge the crop for the means to make it. That may be done by the special lien, as provided in the 1st, 2d and 3d sections. The 7th section is of broader import, and allows a mortgage or deed of trust (for supplies to make the crop, as well as for any other debt), being produced, or to be pro-

---

Opinion of the court.

---

duced within fifteen months from the date of such security. The entire statute relates to the subject of liens on crops.

But the legislature did not suppose that this statute had been repealed by the code of 1871, which took effect in October of that year; for by the statute of April 5th, 1872, sec. 13, p. 135, it is expressly referred to and recognized to have been in force. Further recognition is made by the legislature in October, 1873, when it was expressly repealed, at the then extra session of the legislature.

Since the legislative department of the government has twice distinctly recognized the act of 1867 as unrepealed by the code of 1871, we should be well satisfied that that department of the government were in error, and the subject free from reasonable doubt, before we could declare the statute to have been repealed. We think the statute of 1867 remained in force until repealed in October, 1873.

By the 6th section of the act of 1867, Stovall's judgment did not have a lien on the growing crop. The earliest time that such lien could attach was, after the repeal of the statute, October 22d, 1873. But the lien of the deed of trust attached to the cotton crop, at the time of its being filed for record, July 23d, 1873. This is so unless, as argued by counsel, the lien of the judgment related back to the date of its rendition. The language of the act of 1824, is, "in all cases the property of the defendant shall be bound and liable to any judgment that may be entered up, from the time of entering such judgment." In *Moody v. Harper*, 25 Miss., 493-4, it was held that the lien attached on after acquired property, from the time it was acquired by the debtor, and did not relate back to the date of the judgment. The lien on all judgments in existence when the debtor obtained the property attached alike. Art. 261 of the code of 1857; p. 524, regulating the lien of enrolled judgments, is literally reenacted in the code of 1871, § 830, except the final clause of the section of the former, in relation to judgments of justices of the peace. In the

## Syllabus.

case of *Jenkins v. Gowen*, 37 Miss., 446-7, the question carefully considered by the court was, as to the extent of the lien on after acquired property under the enrollment law; and the court held that the enrollment law gave the same extent of lien precisely conferred by the statute of 1824; both statutes conferred the lien upon the property owned at the date of the judgment, the enrollment relating back to the date of judgment, if enrolled within thirty days. As to property acquired afterwards, the lien attached the moment of its acquisition. The judgment operates as a lien (if duly enrolled) from the date of its rendition, upon all the property owned by the debtor at that time. The lien attaching to after acquired property, dates from its acquisition and does not relate back to the time when the judgment was rendered. Applying this construction to *Storall's* judgment, no lien attached to the growing crop when his judgment was enrolled, but the lien did attach upon the cotton when matured and gathered, and not before. *Howard v. Simmons*, 43 Miss., 89.

Upon the principles of the authorities hereinbefore cited, we think that the lien of Cayce under the trust deed is superior to *Storall's* judgment.

Wherefore, the judgment is reversed, and cause remanded for a new trial.

---

R. J. LITTLEWORT, Supt., etc. v. JANE F. DAVIS et al.

1. **ABSOLUTE DEED—WHEN A MORTGAGE.**—It is well settled that an absolute deed will be valid and effectual as a mortgage, if it clearly appear that it was designed as a security for money. And this may be shown to be the intention and effect of the deed, by a contemporaneous or subsequent writing, or by an agreement resting in parol. *Prewett v. Dobbs*, 13 S. & M., 440.
2. **SCHOOL FUNDS—LOAN THEREOF—SECURITY, ETC.**—A loan of the school fund upon mortgage or other security than that named in the statute, is a misapplication of the fund for which the trustees would have been per-

---

Statement of the case.

---

sonally liable. *Lindsay v. Marshall*, 12 S. & M., 590. But the statute does not make void a mortgage or other security for a loan of the school funds.

3. **CORPORATIONS — CONTRACTS THEREOF — WHEN VALID.** — If a corporation make a contract outside of the purposes of its creation, it is void, because it had not power over the subject in reference to which it acted. But if it contracts with reference to a subject within its powers, but in so doing exceeds them, the person with whom it deals cannot set up such violation of its franchises to avoid the contract. School trustees are a *quasi* corporation.
4. **BILL IN CHANCERY — DEMURRER — ITS EFFECT.** — A demurrer to a bill admits all the allegations of fact, well stated in the bill, and reference cannot be had to exhibits to aid the bill.

**APPEAL** from the Chancery Court of Tallahatchie County.  
Hon. B. F. SIMMONS, Chancellor.

The predecessor of appellant filed his bill alleging that on the 1st of February, 1867, Jane F. Davis borrowed from the board of trustees of the 16th section, etc., \$667.64, money belonging to said section. That at the same time she executed to the president of the board and his successors in office, her note under seal for said sum, payable on the 1st of January, 1868, with interest at 10 per cent. per annum; that the note expressed upon its face that it was given for the purchase money of certain land; that at the same time said Jane F. executed to said president a deed which purports upon its face to be an absolute conveyance in fee simple with warranty of title; that the deed was in fact intended as a mortgage to secure the payment of the note under seal; that said note and deed came to the hands of the board of school directors as successors of the board of trustees; that said Avery was superintendent, etc.; that only a part of said note was paid, and that balance remains due and unpaid; that said Jane F. was sued on the note, judgment obtained, execution issued and returned no property found; that Jane F. is totally insolvent, etc.; that before said judgment was obtained, said Jane F., in consideration of a debt she owed appellee, B. F. Priddy, executed to said Priddy a

---

Brief for appellant.

---

warranty deed to said land; that although the deed to said president was never recorded, the said Priddy, before and at the time of the said conveyance to him by the said Jane F., well knew that said mortgage had been executed to said president, and that the said debt the said mortgage was made to secure, had never been paid; that said deed from said Jane F., to said Priddy was made to defeat said mortgage. The bill prays for summons for a sale of the land and for general relief.

To the bill a demurrer was filed, assigning the following causes of demurrer:

1. That complainant does not show equitable title to the instruments filed with the bill in exhibits A. and B.

2. That complainant does not show that he is entitled to maintain his bill because the contract between defendant, Jane F., and the board of trustees, was not authorized by law, and therefore void.

3. Substantially the same as 2d and 4th. That the facts alleged in the bill do not operate as notice to defendant, Priddy, of the existence of the mortgage executed by said Jane F. Davis to said president.

Upon the hearing this demurrer was sustained, and appellant declining to amend on permission of the court to amend, the bill was dismissed, from which decree an appeal was taken to this court, and the following assigned as error:

1. The court below erred in sustaining the demurrer of appellees and in dismissing the bill.

*Fitzgerald & Marshall*, for appellant, contended:

1. That although the statute did not, in terms, authorize the taking of a mortgage to secure a loan of school funds, yet it did not render void a mortgage so taken. *Lindsey et al v. Marshall*, 12 S. & M., 587; *Hutch. Code*, p. 218, sec. 4; *Angell & Ames on Corp.*, §§ 253, 254, 268; *Haynes v. Covington et al.*, 13 S. & M., 408.

2. That the loaning of the fund upon other security than that allowed by the statute, was a misapplication of the fund for



---

Brief for appellees.

---

which the trustees would be personally liable, and for which they might have been deprived of their franchises, but did not vitiate the mortgage taken for the loan.

3. That the board of school trustees were not necessary parties to the bill for foreclosure because the title to the property was taken in their fiduciary capacity as manifested by the terms of the deed.

*Shelton & Shelton*, for appellee:

The writings show a sale by Mrs. Davis to Roan, supt., and the purchase money paid by him to her, and her bond to him reciting a verbal sale by him to her for the amount of that bond; he retained the title. The bill charges that the whole arrangement was security for a debt:

1. The security must be enforced according to the writings; they are the exponents of the agreement. These make Roan a vendor, Mrs. Davis vendee, by verbal agreement, Mrs. Davis' bond only showing the terms of the parol agreement, Roan holding the legal title. The remedy must be according to the written terms in Mrs. Davis' bond.

2. Upon such security, Roan's remedy, as vendor, was by bill for specific performance of the executory agreement shown by Mrs. Davis' bond. Upon that remedy, he must have tendered a title, so that when she paid her money she would get title, the whole agreement would thereby have been executed, not *one side of it only*. 4 S. & M., 294; 6 J. C. R., 409; 2 S. & M., 590.

3. The foregoing principles are specially applicable to this case, because Roan holds the title and is not a party to the suit, the complainant cannot make title, and Mrs. Davis has no writing from Roan, and against him, is without remedy.

4. Complainant must, by his bill, show readiness and ability to have the contract executed by giving Mrs. Davis title before he can compel defendants to pay the money; if complainant thinks this can be done, it is for him to make the necessary parties with proper allegations, so that when the court requires defendant to

---

Opinion of the court.

---

pay the money, it shall also decree conveyance of title to them in due and proper manner. 9 S. & M., 244; 7 S. & M., 268; 2 Wheat. R., 336; 12 Vesey, Jr., 425; 33 Miss., 269.

5. The court, by its decree sustaining the demurrer, gave complainant leave to amend his bill, which complainant *refused to do*, and thereupon the bill was dismissed. If the demurrer was properly sustained, the court, on complainant's refusal to amend, could not do otherwise than dismiss the bill.

SIMRALL, J., delivered the opinion of the court.

This is a suit in equity to enforce an absolute deed conveying land, as a mortgage to secure a debt for money borrowed by Jane F. Davis from the trustees of the schools for the township.

The bill, with distinctness, avers the loan of the money, the execution of the bond for its repayment, and the execution of the deed purporting to convey the quarter section of the land therein described to the president of the trustees, absolutely. But the intention was that the conveyance should operate as a mortgage security for the debt.

It is well settled, that an absolute deed will be held to be valid and effectual as a mortgage, if it clearly appear that it was designed as a security for money, and such may be shown to be the intention and effect of the deed, by a contemporaneous or subsequent writing, or by agreement resting in parol. *Prewett v. Dobbs*, 13 S. & M., 440; *Anding v. Davis*, 38 Miss. Rep., 594; *Vasser v. Vasser*, 23 Miss. Rep., 378.

But the objection most strenuously urged to the relief sought is, that the trustees were only authorized by the statute to loan on promissory notes, with good personal sureties; and since they have transcended their power, the mortgage is inoperative. *Hut. Code*, 214.

A loan of the school fund upon mortgage, or other security than that named in the statute, would have been a misapplication of the fund, for which the trustees would have been person-

---

Opinion of the court.

---

ally liable. *Lindsay v. Marshall*, 12 S. & M., 590. Whilst this is so, it does not necessarily follow that the borrower can set up, as ground to defeat the security, that the statute did not allow a loan upon any other than personal security.

These township school trustees were a *quasi* corporation, charged with the duty of managing the funds, and keeping up schools, with the interest arising upon loans. There was a loan irregularly made. The power to loan is conferred; the mode is regulated. If a corporation make a contract altogether outside of the purposes of its creation, it is void, because it has not power over the subject in reference to which it acted. But if it contracts with reference to a subject within its powers, but in so doing exceeds them, the person with whom it deals cannot set up such violation of its franchises to avoid the contract. *Haynes v. Covington*, 13 S. & M., 411, and cases there cited. It might be ground for the resumption of its franchises by the state.

The adjudged cases support this view of the law. The charter of the Bank of South Carolina directed that loans upon long time should be secured by mortgage. But a bond with sureties for such a loan was held to be binding. *Bank of S. C. v. Hammond*, 1 Rich., 281. The charter of a savings institution required that its funds should be vested in or loaned on public stocks or private mortgages, and when so loaned, a sufficient bond or other personal security should be taken from the borrower, it was held, that a promissory note without other security was not for that reason invalid. *Mott v. U. S. Trust Co.*, 19 Barb., 568; *U. S. Trust Co. v. Brady*, 20 Barb., 119.

So also when the charter prescribes what species of security shall be taken by a corporation of its officers or agents, for faithful performance of duty, a different sort of security from that prescribed may be enforced against the person who gave it. *Bank of Northern Liberties v. Cresson*, 12 S. & R., 306.

We think therefore, that the defendant cannot set up the irregularity of the loan and security, to defeat the relief sought by the

---

Opinion of the court.

---

bill. The policy of the statute directing the sort of security to be taken was, to preserve the fund for the charitable use to which it was devoted. If the trustees, from ignorance or design, lean upon different security, and such security should be held void, it would defeat the object of the legislature, which was to protect the interest of the beneficiaries. In that class of cases where the contract has been declared void, the law has by words, or plain intendment, prohibited it or affixed that consequence to it.

Nothing of that sort is in this statute.

This suit should be regarded with the same leniency as if the beneficiaries were complainants, seeking to recover their funds invested on mortgage. *Vernon v. Board Police*, 47 Miss., 188.

But the statute does not make void or illegal a mortgage or other security, for a loan of the school funds.

If the loan had been made without any sort of security, would the borrower plead that he had failed to give personal security; or if, in addition to the personal security, he had made a mortgage as cumulative indemnity, could he resist a foreclosure because the statute did not expressly authorize? On this point it was said by the court, in *The Bank, etc. v. Cresson*, 12 S. & R., 814, that when the statute gives a particular form, and makes it the duty of the officers to take a bond in that form, and a different security is given, if there is no provision in the statute declaring it to be void, it is a valid obligation at the common law.

But it is also insisted that by a comparison of the note or bond of Jane F. Davis with the deed, which are made exhibits to the bill, a proper inference would be that Jane F. Davis was to buy back the land, and the only remedy of the complainant, if he had any at all, would be by an offer to convey, and demand of Jane F. Davis of the money, and then file a bill on that state of facts. It is further urged, that that sort of relief could not be granted in this suit.

The demurrer admits all the allegations of fact well stated in the bill, and we cannot go outside of the bill to borrow aid from exhibits. The bill, if true, entitles the complainant to relief.

---

Syllabus.

---

The averment is, that defendant, Priddy, accepted the conveyance from Jane F. Davis, with knowledge of the prior unrecorded mortgage. If that be so, he occupies no better position than his vendor.

It was error to sustain the demurrer and dismiss the bill.

Decree reversed, demurrer overruled, and cause remanded, with leave to defendants to answer in fifty days from this date.

---

N. B. LANIER v. STEPHEN S. BOOTH et al.

1. CHANCERY COURT — INJUNCTION — RIGHT OF WAY — EASEMENT. — A right of way is the privilege which an individual or particular description of individuals have of going over another's grant. It is an incorporeal hereditament of a real nature, entirely different from a common highway. It may be either a right in gross, which is purely a personal right incommunicable to another, or a right appendant or annexed to an estate, and which may pass by assignment with the estate to which it is appurtenant.
2. SAME — SAME — MODES OF ACQUIRING EASEMENT. — There are three modes in which easements may be acquired, namely, by express grant, implied grant, and prescription, which presupposes a grant to have existed. The existence of the grant may be established by the production of a deed expressly declaring it, or may be inferred by construction from the terms of an existing deed, or evidence of the grant may be derived from its having been so long enjoyed as to be regarded as proof that a grant was originally made, though no deed is produced which contains it.
3. SAME — SAME — MODE OF CREATING AN EASEMENT. — An easement may be created, or reserved by an implied grant, when its existence is necessary to the enjoyment of that which is expressly granted or reserved, upon the principle that where one grants anything to another, he thereby grants him the means of enjoying it, whether expressed or not: thus, if A. sells to B. a parcel of land, surrounded by other lands, and there is no access to the granted premises, but over his own, he gives the purchaser a right of way, by implication, over his own land to that which he has granted.

50	410
71	640
50	410
78	276
50	410
88	451
88	452
88	453

---

Statement of the case.

---

4. SAME—SAME—RIGHT OF WAY BY PRESCRIPTION—LENGTH OF TIME REQUIRED.—Originally the time required for gaining a right of way by prescription, began from some time anterior to the memory of man; this was fixed at the commencement of the reign of Richard I. This was open to be rebutted by proof, and to avoid it, the courts adopted a notion of presuming ancient grants, till it became a settled principle of the common law, that such an enjoyment for the term of twenty years raises a legal presumption that the right was originally acquired by title. 2 Washburn on Real Property, 293.
5. SAME—SAME—THE RIGHT MUST BE EXERCISED ADVERSELY.—It must be adverse to that of the owner of the servient estate, since no length of enjoyment by his permission, and under a recognition of his right to grant or withhold it, at his pleasure, will ripen into an easement.
6. SAME—SAME—CASE IN JUDGMENT.—Where the case comes within these rules, and the dominant and servient estates are contiguous to each other, and the parties are owners respectively, and that the enjoyment has been notorious, uninterrupted and adverse, the *fee* will be presumed, and the easement will be protected by the court.

APPEAL from the Chancery Court of Warren County. Hon. E. HILL, Chancellor.

Appellees filed their bill in the chancery court of Warren county, February 28, 1871, alleging, substantially, that they are the owners, and have occupied certain lands in said county since 1837, and have had the continuous and uninterrupted possession of the right of way over a small tract of land lying contiguous thereto, now owned by the defendant, N. B. Lanier, that the land they now own was owned by one Nathan White in 1810, next by Edward Mitchell, next by Wiley Boleman, then by C. H. Edwards, from whom your orators purchased in 1837; that all the prior owners from 1810 down to 1837, and your orators from 1837 to the present date, have had the continuous and uninterrupted possession of the said right of way; that all the successive owners of the said lands now owned by the said Lanier from the year 1826, together with the said Lanier, have acquiesced in the enjoyment of the said easement until the 15th day of February, 1871, when the said Lanier notified complainants, by letter, that they must change the road aforesaid or within thirty days from that time he

## Briefs.

would close the said road himself ; that he has now run his fence up to the road on either side, and they are satisfied from the indications, that he intends to and will carry his threats into execution, unless restrained, etc. That the object of defendant is to annoy and inconvenience complainants. They insist that they have an indefeasible title to said right of way by prescription and the lapse of time, and that the defendant purchased the said land subject to the said right of easement, and they pray for an injunction restraining defendant, etc., which was granted, and upon the final hearing of the cause, the injunction was made perpetual by decree of the court and the case is brought to this court on appeal.

*Buck & Clark*, for appellants, contended :

That the bill did not make out a case of prescriptive right, so that the statute of limitations would apply ; nor does their bill charge that they have enjoyed an *adverse* and *exclusive* user of the private right of way claimed, for any length of time. 11 Gill, 371 ; *Magee v. Magee*, 37 Miss., 138 ; *Ford v. Wilson*, 35 Miss., 490 ; *Adams v. Guice*, 30 Miss., 397.

2. That if the user of the easement was by license or permission of the owner, no length of time through which such user might run would support the use as a matter of right.

*R. V. Booth*, for appellees, contended :

1. That the chancellor did not err in granting the injunction nor in overruling the motion to dissolve it, and cited the following authorities in support thereof. 2 Story Eq. Jur., § 901 to § 935 ; *Adams' Eq.*, p. 415 ; *Osborn et al. v. United States Bank*, 9 Wheat., 766 ; *High on Inj.*, p. 316 ; *Shipley v. Caples*, 17 Md., 179.

2. That the chancellor did not err in the decree perpetuating the injunction, because the appellees had had the continuous and uninterrupted use and enjoyment of this way and the exclusive control thereof for a period extending over more than thirty years, and the former owners of the land had the use and enjoyment of said way for fourteen years, thus ripening and maturing appellee's

---

Opinion of the court.

---

title to the easement before appellants became the owner of the land over which the road passes, and cited 3 Kent's Com., p. 575; Hammond v. Zehner, 23 Barb. 473; Shaw v. Crawford, 10 Johns, 236; Miller v. Garlock, 8 Barb., 153; Lansing v. Wiswall, 5 Denio, 213.

PEYTON, C. J., delivered the opinion of the court.

This is an appeal from the decree of the chancery court of Warren county, perpetuating an injunction restraining the appellant from obstructing the appellees' right of way over a small portion of his land.

This is believed to be the first instance in this state in which the doctrine of the right of private way has been invoked. The law, however, on this subject, it must be conceded, is ancient and well settled.

A right of way is the privilege which an individual, or a particular description of individuals, as the inhabitants of a village, or the owners or occupiers of certain farms, have of going over another's ground. It is an incorporeal hereditament of a real nature, entirely different from a common highway. It may be either a right in gross, which is purely a personal right incommunicable to another, or a right appendant or annexed to an estate, and which may pass by assignment with the estate to which it is appurtenant.

There are three modes in which easements may be acquired, namely: by express grant, implied grant, and prescription, which, indeed, presupposes a grant to have existed. But this is, in effect, merely saying that an easement, being an interest in land, can be created only by grant, the existence of which may be established by production of a deed expressly declaring it, or may be inferred, by construction, from the terms and effect of an existing deed, or evidence of the grant may be derived from its having been so long enjoyed as to be regarded as proof that a grant was originally made, though no deed is produced which contains it. In



---

Opinion of the court.

---

case of an express grant, the fact of the creation of the easement, as well as its nature and extent, is determined by the language of the deed, taken in connection with the circumstances existing at the time of making it. An easement may be created or reserved by an implied grant when its existence is necessary to the enjoyment of that which is expressly granted or reserved, upon the principle, that where one grants any thing to another, he thereby grants him the means of enjoying it, whether expressed or not. Thus if A. sells to B. a parcel of land surrounded by other lands, and there is no access to the granted premises but over his own, he gives the purchaser a right of way, by implication, over his own land to that which he has granted.

It may be here remarked that the right of way under consideration is appurtenant to the dominant estate, and in all such cases, a conveyance of that estate carries with it, as before stated, the easement belonging to it, whether mentioned in the deed or not. 2 Washburn on Real Estate, 279.

The case at bar involves the length of time the use has been enjoyed, the mode and extent in which it has been applied, and how there has been an acquiescence on the part of the owner of the servient estate which is adversely affected by such user. Originally, the time required for gaining a right by prescription, began from some point anterior to the memory of man. And this was, at one time, fixed at the commencement of the reign of Richard I. But as it was always open to be rebutted by proof that the use did begin within the period of memory, the courts, to avoid this, and to sustain privileges which had been enjoyed, adopted the notion of presuming an ancient grant by deed which had been lost, from a period of enjoyment, the length of which was in some measure governed by the term adopted as a bar to the claim of land itself, till it became a settled principle of the common law, that such an enjoyment for the term of twenty years raises a legal presumption that the right was originally acquired by title. 2 Washburn on Real Property, 298. The period

---

Opinion of the court.

---

of twenty years has been adopted by the courts in analogy to the statute limiting the entry into lands, but as the statute does not apply to incorporeal rights, the adverse use is not regarded as a legal bar, but only a ground for presuming a right either by grant or in some other form. The occupation, in such cases, is not conclusive, but it is evidence which is open to be rebutted by evidence on the other side. Whatever discrepancy there may be between the language of the different cases, it will probably be found to have arisen from the courts not making a distinction between the ancient doctrine of prescription which was, from its very nature conclusive, as it went back beyond the period of evidence, and the modern doctrine of prescription, which is another name for presumption, and which, like all legal presumptions of evidence, is subject to be negatived or controled by other evidence.

As user becomes so important in determining questions of prescriptive right, the law has been careful in defining the circumstances which must concur in connection with the actual enjoyment of any of these privileges, called easements, to give them the legal character and incidents of an easement. To give a user this effect, it must be uninterrupted in the land of another, by the acquiescence of the owner, for a period of at least twenty years or the period of limitation of a right of entry into land of the state where the land lies, under an adverse claim of right. While all persons concerned in the estate, in or out of which it is derived, are free from disability to resist it, and are seized of the same in fee and in possession during the requisite period, where all these circumstances concur, it raises a *prima facie* evidence of a right to such easement acquired by a grant which is now lost.

Many of the cases make use of the term "adverse enjoyment," which is substantially the same as its being enjoyed under a claim of right against the owner of the land, out of which the easement is derived. And all the cases concur in the doctrine that the right must be exercised adversely to that of the owner of the servient estate, since no length of enjoyment by his permission, and

## Syllabus.

under a recognition of his right to grant or withhold it, at his pleasure, will ripen into an easement. The adverse enjoyment, to confer a right of way, must be open, notorious and uninterrupted for the period required by the law. But it is no objection that the user began in trespass. *Sibley v. Ellis*, 11 Gray, 417. And it has been held, that the mere passing across open, unclosed land would not gain a right of way without something to show that, by so doing, a right to such use was asserted, such as working upon the road and keeping it in repair under a notorious persistent claim of a right of way. 2 Washburn on Real Property, 298.

If the foregoing view of the law of easements in relation to the right of way be correct, have the appellees brought themselves within it, and established their claim to the right of way in controversy? We think they have.

It appears from the testimony that the dominant and servient estates were contiguous to each other. And as the parties to this suit are shown by the evidence to be the *owners* respectively of these estates, we are to presume that the appellees are seized *in fee* of the dominant estate, and that the appellant is seized *in fee* of the servient estate. It is proved that the appellees have been in the open, notorious, uninterrupted adverse use, possession and enjoyment of the road, over which they claim a right of way, for a period of about thirty years, during which, at various times, they have wrought upon and kept the same in repair. This, it is believed, entitles them to the right of way claimed in their bill.

The decree must, therefore, be affirmed. ✓

---

G. W. BROOKS v. C. G. SNEAD.

**AFFIDAVIT — SIGNATURE OF AFFIANT.** — Where the statute requires an affidavit to be made by a party praying an appeal from a justice's court, the certificate of the justice of the peace that the affidavit required by law was made, is sufficient evidence that the affidavit was made, although the

---

Opinion of the court.

---

affiant omitted to sign his name to the affidavit. The signature of the affiant is not an indispensable requisite. Rev. Code, 1871, § 1332; *Redus v. Wofford*, 4 S. & M., 591.

ERROR to the Circuit Court of Rankin County. Hon. URIAH MILLSAPS, Judge, presiding.

This was a suit brought by plaintiffs in error against defendant in error, before a justice of the peace. Defendant filed a setoff larger than plaintiffs' demand, and obtained judgment for the excess. An appeal was taken to the circuit court, by Brooks, who made the affidavit and executed the required bond, but the signature of the affiant did not appear on the affidavit for appeal. The defendant in the circuit court moved to dismiss the case for want of the proper affidavit, which motion was sustained and the case dismissed, and the case comes to this court on writ of error.

*G. W. Brooks*, for plaintiff in error, cited the following authorities: Rev. Code 1871, § 1333; *George's Digest*, p. 10, and cases referred to; 4 S. & M., 579, 439; 47 Miss., 228; 5 How., 585.

*Myers & Lowry*, for defendants in error:

There is no law allowing amendment of affidavits for appeal from a justice of the peace. The certificate of the officer that an answer was sworn to in a chancery suit, without the signature, was held sufficient. *Yeizer v. Burke*, 3 S. & M., 439. Where amendments are allowed, in the discretion of the court, the exercise of that discretion will not be reversed, unless manifest injustice be done. *Bloom v. Price*, 44 Miss., 79.

SIMRALL, J., delivered the opinion of the court:

This was an appeal case in the circuit court from the judgment of a justice of the peace. The appeal was dismissed by the circuit court, for the want of a proper affidavit, directed by Code of 1871, § 1332, viz: "an affidavit filed that such appeal is not made for delay, nor to vex, harass or oppress his adversary, but that justice may be done."

---

Opinion of the court.

---

The objection is, that Brooks, the appellant, did not sign the affidavit. The justice of the peace certifies by his signature and seal, that Brooks appeared before him and made the oath, in the words of the statute. Lexicographers define an affidavit to be a "declaration on oath, a declaration in writing, sworn before a magistrate."

Is the signature of appellant to the affidavit an indispensable requisite? In *Redus v. Wofford*, 4 S. & M., 591, the creditor did not sign the affidavit setting forth the ground of attachment. To that objection, the court responded, "the evidence of this having been done, is the certificate of the justice or other officer." "The signature of the creditor attached to the affidavit would afford no proof of that fact, nor is it required by law."

This language was used with reference to the "complaint on oath \* \* of a creditor, for the attachment against his absconding or nonresident debtor." H. & Hut. Code, 548, sec. 11. The 13th section makes void every attachment issued without bond and *affidavit* taken and returned, as aforesaid. In the 13th section the word "affidavit" is used, as a convertible term, with "complaint on oath" in the 11th section.

The ruling in the case quoted is, that "the complaint on oath" or the "affidavit" as used in the other section need not be signed by the creditor. But the certificate of the justice of the peace, or other officer, that the oath was made, is ample evidence of that fact.

For the same reason, if the justice of the peace certifies that the party craving an appeal, makes the prescribed oath, certified by the justice, the justice is satisfied. Such certificates were held good; that the answer to a bill in chancery was sworn to. *Yeizer v. Burke, Watt & Co.*, 3 S. & M., 453.

We are of opinion that the appellant did make the affidavit for appeal, prescribed by statute, although he omitted to sign it. The case of *Pettus and Stevens v. Patterson*, 47 Miss. Rep., 228, has no application to the point made in this case. It was held in that

---

Syllabus.

---

case that the appeal was properly dismissed, because no affidavit for appeal, and no certified copy of the proceedings before the justice of the peace were filed in the circuit court.

The judgment of the circuit court is reversed, and cause remanded.

---

DELILAH F. IRION et al. v. MILTON F. HUME, Assignee, etc.

1. **ATTACHMENT — CLAIMANT'S BOND — ISSUE THEREON.** — In an issue on a claimant's bond, the burden of proof is on the plaintiff. It is not necessary that he should show title to the property in himself. He will succeed by showing title in a stranger, as thereby he demonstrates that the property is not liable to the creditors' demand. *Thornhill v. Gilmer*, 4 S. & M., 158.
2. **SAME — WHEN OBLIGOR RELEASED — RULE AT COMMON LAW.** — At common law, when the condition of the bond is possible at the time of making it and before the same can be performed, becomes impossible by the act of God, or of the law or the obligee, then the obligation is saved. If the condition is impossible at the time of making the bond, the condition is lost and the bond becomes absolute.
3. **SAME — PLEA OF PUIS DARREIN CONTINUANCE.** — The rule is well established, that whatever new matter has arisen in point of time, since the last continuance, which would defeat the plaintiff's action, must be taken advantage of by this plea. It serves to present some new fact not in existence at the date of the original pleading.
4. **SAME — EMANCIPATION.** — The emancipation of slaves was by a law declaring slavery to have been abolished, etc. The courts must take cognizance of law judicially, and it does not require averment to bring it to their notice.
5. **SAME — CASE IN JUDGMENT.** — S. D. & Co., in 1861, levied an attachment upon certain slaves, supposed to belong to S. I. and W. I. The wives of each preferred a claim to a portion of the slaves levied upon, and gave the claimant's bond. In 1861, the attaching creditors tendered an issue which was joined in 1866 by D. I., one of the claimants; upon the trial, the jury found for the plaintiffs, but failed to assess the value of the property attached: *Held*, that it was error in awarding a judgment for the value of the slaves as assessed by the sheriff in his return upon the attachment, and that as there was no property subject to the plaintiff's debt, there could rightfully be no assessment of value, nor could there be judgment for the sum so determined.

50 419  
70 7

---

Statement of the case.

---

**ERROR to the Circuit Court of Alcorn County. Hon. B. B. BOONE, Judge.**

Scruggs, Donegan, & Co. brought suit, by attachment, against Thomas Irion and W. M. Irion, for \$52,370.78, in the circuit court of Tishemingo county, on the 12th day of March, 1861, alleging, as a ground for the issuance of the attachment, that the debtors had assigned and disposed of their property, or were about to do so, with intent to defraud their creditors, or give an unfair preference to some of them. Bond was executed according to law, and the attachment issued was, on the 16th March, 1861, and the 18th March, 1861, levied on thirty-seven slaves, valued at \$30,800. Another writ issued in this case was, on the 20th March, 1861, levied on five slaves, two horses, one rockaway, one buggy, quarter section of land on which W. M. Irion resided, and a house and lot, in which W. G. Campbell resided, but no value was fixed to this last named property attached. On the 23d September, 1861, the writ was served on W. M. Irion and Thomas Irion. A declaration with numerous counts, accompanied by a long bill of particulars, was filed to the September term, 1861, of the circuit court.

On the 23d March, 1861, Delilah Irion gave bond and propounded a claim to part of the property attached. The penalty of the bond was \$13,000. Mary M. Irion also gave bond in the penalty of \$22,000, and propounded her claim to the balance of the property attached.

At the September term, 1861, issue was tendered by the plaintiff and joined by claimant at the September term, 1866, of the circuit court of Tishemingo county. The death of some of the plaintiffs was suggested, and suit continued in the name of John W. Scruggs, as surviving partner, and subsequently his bankruptcy was proven, and the suit revived in the name of C. H. Donegan, assignee, and he dying, the case was revived in the name of Milton Hume, assignee.

---

Statement of the case.

---

The suit was afterwards removed to Alcorn county, and the verdict and judgment are in these words:

"This day came the parties, by their attorneys, and thereupon came a jury of good and lawful men, to wit: J. W. Cansey and eleven others, who, being elected, impaneled, charged and sworn well and truly to try the issue joined between the parties and the trial of the right of property, upon their oaths do say, that they find the issue for the plaintiff in the attachment, and the jury having failed to find the value of the property, and the plaintiff, by his counsel, came into court and elected to take the value of the property assessed by the sheriff, who levied the attachment without resorting to a writ of inquiry. It further appearing to the court that the negro slaves in the pleadings mentioned, to wit, Mary, Monroe, Francis, Jack, Lucy, Juba, Joe, Polly, Stephen, Hannah, Lizzie, negro child with unknown name, and Cale, were, at the time of the levy of said attachment, slaves, and liable to the levy of said attachment, and that by reason of the freedom of said slaves the same cannot be delivered to the sheriff. It is, therefore, considered by the court that the plaintiff recover of said defendants the sum of six thousand five hundred dollars, the value of said property assessed by the sheriff, together with the costs in this cause expended, for which execution may issue."

From which judgment a writ of error was prosecuted, and the following assigned as error:

1. A judgment could not be rendered in this case in favor of Milton F. Hume, assignee of J. W. Scruggs, said suit having never been revived in his name. The judgment was for the value of the negro slaves levied on by the original attachment as assessed by the officer who levied the attachment in the aggregate, and not for the damages for the detention of the property.

2. The jury did not assess the value of each negro slave levied on, separately, as required by the statute.

3. The negro slaves levied upon were emancipated by act of the Government of the United States of America, and the sure-



---

Brief for plaintiffs.

---

ties on the replevin bond were thereby exonerated, and no judgment could be rendered on said bond for the value of said negroes.

4. No judgment could be rendered for the value of the slaves levied on by the attachment, they having been set free by the general government before the judgment was rendered in this case.

5. The court erred in overruling the motion of appellants in the court below to set aside the verdict of the jury in this case and grant a new trial, for the causes assigned in said motion.

*Inge & Beene*, for plaintiffs in error, contended :

1. That at the time the claimant interposed her claim, she entered into bond to prosecute her claim to effect, and in case of failure, she would pay to plaintiffs such damage as would be awarded against her, and that she would deliver the same property to the sheriff, etc. Code of 1857, p. 532. At the time she entered into the contract, it was legal and proper, but by subsequent acts of the general government and the state, it became illegal and improper, and therefore avoids the promise. 41 Miss., 328; 44 Miss., 268.

2. That at the time of the trial the title to the property was in no one. The slaves were free, and no judgment could be legally rendered for them or their value. 44 Miss., 272. That in this case the jury did not assess the value of the slaves, and therefore no judgment could be rendered for their value independent of emancipation. *Young v. Pickens et al.*, 45 Miss., 555.

3. That the surety on a bond given by a defendant in attachment to replevy slaves is not liable for the value of the slaves after they are emancipated by lawful authority. 44 Miss., 254; 45 Miss., 553. That in this case there was no proof of damage on account of detention, and no judgment could be rendered for the detention.

4. That the judgment being joint against the claimant and her sureties for the value of the slaves as assessed by the sheriff, must be reversed as to all. 44 Miss., 254; *Tanner v. Battaile*, 355. opinion, 1871; 44 Miss., 555.

---

Brief for defendant.

---

5. That as courts are bound to take judicial notice of law, it was not necessary to plead the emancipation of the slaves specially. *Young v. Pickens et al.*, 45 Miss., 555.

6. That the suit was never revived in the name of Hume, assignee, etc., the party in whose favor the judgment is rendered, nor is there anything in the record of the case showing that he has any interest in, or in any manner connected with it, and for this reason, the judgment is a nullity.

*H. H. Chalmers*, on same side, filed an elaborate brief covering the same grounds as made in the brief of associate counsels, and insisted that it was not necessary to plead specially the emancipation of the slaves. That the court must judicially take notice of such a public act. That a plea of *puis darrein* continuance is only necessary to set up some fact *dehors* the record, which has occurred since the last continuance, and this fact must be of a *private* and not of a *public* character. Public acts never require to be specially pleaded.

2. That in no case in this state in which the court held judgments for the value of negroes to be erroneous was there any plea of *puis darrein* continuance. *Bradford v. Jenkins*, 41 Miss., 328; *Whitfield v. Whitfield*, 44 ib., 267; *Young v. Pickens et al.*, 45 ib., 553.

*W. F. Dowd*, for defendant in error, contended :

1. That the claimant having failed to make up the issue until after the return term, and after plaintiff's motion for judgment by default, he thereby abandoned and forfeited his claim to the property. *Martin v. Lofland*, 10 S. & M., 317. This judgment by default is conclusive against the claimant. *Shirley v. Fearn*, 33 Miss., 653; *Sears v. Gunter*, 39 Miss., 338. That the court below only rendered such judgment at the September term, 1873, as it should have rendered at the September term, 1866, and it should therefore be affirmed. Code 1857, p. 381.

2. That the emancipation of the slaves, as avoiding the bond and discharging the sureties, was raised for the first time by a mo-

---

 Brief for defendant.
 

---

tion for a new trial. That this should have been pleaded *puis d'avein continuance*, and it was too late to make the objection. Brown v. Brown, 13 Ala., 208; 44 Miss., 266; Clangleton v. Black, 24 Miss., 185; 11 S. & M., 361; Price v. Sinclair, 5 S. & M., 258. Pool v. Hill, 44 Miss., 310. Stafford v. Woodruff, 2 S. & M., 191; Nicholl v. Mason, 21 Wend., 339; Pool v. Hill, 44 Miss., 311; Cole v. Harmon, 8 S. & M., 562; M. C. R. R. v. Miller, 40 Miss., 45; Dunlap v. Hearne, 37 Miss., 471; Atwood v. Meredith, 37 Miss., 635; Phipps v. Ingraham, 41 Miss., 256; Leach v. Blow, 8 S. & M., 221.

8. That this court cannot review or decide any point not made in the court below, nor can a party obtain a new trial for errors in the rulings of the court or finding of the jury, when the points were not presented on the trial by either the pleadings, proofs or charges. Satterwhite v. Littlefield, 13 S. & M., 302; Binns v. Stokes, 27 Miss., 239; Penrice v. Wallis, 37 Miss., 172; McComb v. Turner, 14 S. & M., 119; House v. Fultz, 13 S. & M., 39; Ferguson v. Applethwaite, 10 S. & M., 304; Parr v. Gibbons, 27 Miss., 375; Learned v. Matthews, 40 Miss., 210; Fox v. Matthews, 33 Miss., 433; Doe v. Natchez Ins. Co., 8 S. & M., 197; Cond. B. Man. v. Martin, 9 S. & M., 618; Monk v. Horne, 38 Miss., 100; Grant v. Planters' Bank, 4 How., 326.

4. That the freedom of the slaves did not release the obligations of the makers of the bond, for the trial of the right of property. That by the conditions of the bond the claimant is clearly made liable for the damages that may be awarded against him, if he fail in the suit. That when the slaves were levied on in March, 1861, they were liable to the attachment, and in the custody of the sheriff. That the claimant wrongfully interposed her claim, took them from the officer and kept them until they were free. She failed in her suit, and the damages should be the value of the property at the time of the levy, because she prevented the plaintiff from making his money by the sale of the property. Thomas v. Degrafenreed, 17 Ala., 606; McGraw v. Hart, 1 Porter, 176;

---

Opinion of the court.

---

Planters' Bank v. Willis, 5 Ala., 770; Langdon v. Brumley, 7 Ala., 53; Dawson et al. v. Shipman, 6 Ala., 27; White v. Ross, 5 Stew. & Port., 138; Cole v. Connelly, 16 Ala., 278; Phelan v. Fincher, 5 Ala., 448. Whitfield v. Whitfield, 44 Miss., 264; Young v. Pickens et al., 45 Miss., 553; Notte v. White, 26 Miss., 26; Browning v. Henford, 5 Hill (N. Y.), 588; Story on Bailments, §§ 130, 132; Code of 1857, p. 532, art. 285.

SIMRALL, J., delivered the opinion of the court.

Scruggs, Donegan & Co. brought an attachment suit against Thomas and William Irion for \$52,370 78, in March, 1861. The attachment in the same month was levied upon sundry slaves and other property. On the 23d of March, 1861, Delilah Irion preferred a claim to part of the slaves, and executed the claimant's bond in the penal sum of \$18,000. Mary M. Irion also claimed another portion of the slaves, and gave bond in the penalty of \$22,000.

At the September term, 1861, the attaching creditor tendered an issue, which was joined, in 1866, by Delilah F. Irion. By the casualties of death, and bankruptcy, the original plaintiffs, Scruggs, Donegan & Co., came to be represented by Milton T. Hume, assignee in bankruptcy of Scruggs, survivor, of the members of his firm.

On the trial, the jury found the issue for the plaintiff, in the attachment, but omitted to assess the value of the property. The plaintiff's counsel, as the record recites, elected to take the value of the property, assessed by the sheriff, at the time of the levy of the attachment, and thereupon the court rendered judgment for \$6,500, the aggregate of such value, reciting as a reason for such judgment, that the slaves, since they were levied upon, have become free, and cannot be delivered to the sheriff.

The main question argued by counsel, and urged as grounds for reversal of the judgment is, that the circuit court erred in rendering judgment for the value of the slaves, they having

## Opinion of the court.

ceased to be the subject of property after the claim of Mrs. Irion was propounded and before the trial was had. Art. 299, Code 1857, p. 533, directs, if the verdict shall be for the plaintiff, judgment shall be awarded, as in *detinue*, against the claimant and the sureties in his bond, for the value of the property. The condition of the bond is, "for the prosecution of such claim with effect, or in case of failure therein \* \* \* that he will well and truly deliver the same property to the sheriff \* \* \* if the claim thereto shall be determined against him." Art. 295, p. 532. The burden of proof shall be on the plaintiff, and the issue shall be governed by the rules which govern the trial of an issue in the action of ejectment. Art. 298.

The precise issue, of which the execution or attachment holds the affirmative, is that the property is liable to the process, and not whether the claimant has established his title. Although the claimant may not have title, yet he will succeed by showing title in a stranger, for, thereby, he has demonstrated that the property cannot be rightfully subjected to the creditor's demand. *Ross v. Garey*, 7 How., 47; *Thornhill v. Gilmer*, 4 S. & M., 153.

But the argument is pressed with earnestness and plausibility, that but for the interposition of Mrs. Irion's claim and bond, the slaves would have been sold, and her responsibility is to be measured by the condition of things, as at the time she replevied the slaves from the sheriff. And whatever changes may have subsequently occurred do not exonerate her.

In *Edson v. Weston*, 7 Cow., 280, the principle was ruled, that the bailee of chattels is excused for not returning them if he has been deprived of possession by paramount authority; so is *Shelbey v. Scotsford*, Yel., 23.

The principle of the common law, stated in the language of Lord Coke, in 1 Ins., 206, a. b., is, that where the condition of a bond \* \* \* is possible at the time of making it, and before the same can be performed becomes impossible by the act of God or of the law, or the obligee, then the obligation is saved; as if

---

Opinion of the court.

---

the recognizance or bond be to appear at the next term of a court, and before the day the obligor dies, then the obligation is saved.

But as put by Blackstone, 2 Com., 341, if the condition is impossible at the time of making the bond, the condition is gone and the bond becomes absolute.

So, where a party agrees to do a particular thing which is lawful at the time, and the legislature comes in and makes it unlawful, here the law absolves from the obligation, as sometimes expressed, "repeals the covenant." *Bradford v. Jenkins*, 41 Miss., 334.

It was lawful for Mrs. Irion and her sureties, at the time the bond was executed, to covenant, in the event of failure to prosecute her claim with effect, "to deliver the slaves to the sheriff." And it was also possible to have saved the obligation. But while her right was undetermined, and before an adjudication upon it, paramount, public sovereign authority intervened, and, by the emancipation of the slaves, rendered it impossible and illegal to perform the covenant. Her principal obligation was to redeliver the slaves to the sheriff if the court should determine they were liable to the plaintiff's debt. The court could not so adjudge, because by law they had ceased to be property. If, as the authorities hold, she had been deprived of possession, and of the ability to return, by the sentence of the law vindicating a paramount title in some other person, she would have been excused. Very plainly, she is absolved from that duty by the destruction of the status of slavery and the enfranchisement of the servile race.

But it is insisted by counsel, that, while it is true the slaves are free, nevertheless the plaintiff was entitled to his judgment, for the alternate value. The judgment directed by the statute is, as in detinue, for the specific property if to be had; if not, then the value. The statute adheres to the import of the obligation — that is, primarily, a return of the property to the sheriff; and, inasmuch as the officer has assessed the value, there can be no enforcement of the pecuniary judgment, except upon a failure to get the property.

---

Opinion of the court.

---

But it has also been urged, that if it were conceded that emancipation, subsequent to the claim made by Mrs. Irion, might be successfully set up, it should have been by plea *puis darrein* continuance.

The rule is well settled, that whatever new matter has arisen in point of time, since the last continuance, which would discharge or defeat the plaintiff's action, must be thus specially pleaded. *Bethea v. McLennon*, 1 Iredell, 524, is an apt illustration of the rule. As where the defendant in detinue has been deprived of the property, since the last continuance, by a recovery in due course of law. In quite all the cases that we have examined, the plea served to present some new and recent fact not in existence at the date of the original pleading.

But while emancipation is a fact, yet it was produced by a law declaring slavery to have been abolished, and that it shall not thereafter exist. The courts must take cognizance of law, judicially, and it does not require averment to bring it to their notice.

This question has been disposed of by authority, adverse to the position of the defendant in error. *Whitfield v. Whitfield*, 44 Miss., 270, et sequiter; *Young v. Pickens*, 45 ib., 556; *Tanner v. Battaile*, MSS. opinion, 1871.

If the attachment creditor could not take judgment for the slaves as property, he could not recover for their value.

The jury found for the plaintiff in attachment, but made no assessment of value. The provision of the statute allowing the valuation of the sheriff to be accepted as the ascertainment of value when the jury fails to fix it, cannot avail the plaintiff. For if there was no property subject to the plaintiff's debt, there could be rightfully no assessment of value, nor could there be judgment for the sum so determined.

There was error, therefore, in awarding judgment for the value of the slaves, as assessed by the sheriff, in his return upon the attachment.

Judgment reversed; and judgment in this court on the verdict for the claimant.

## Syllabus.

## J. W. TURNIPSEED v. W. H. HUDSON.

50	429
188	143

1. OFFICE — CONTEST FOR OFFICE OF CHANCERY CLERK — ESTOPPEL *in pais*. — To establish estoppel *in pais* there must be:
  1. An admission inconsistent with the evidence offered to be given, or the claim offered to be set up.
  2. Action by the other party upon such admission.
  3. Injury to him by allowing the claim to be disproved. 14 Mo., 482.
2. SAME — ABANDONMENT — SURRENDER. — T. was elected clerk of the chancery court of Winston county in 1871, for the term of four years. The act of April 21, 1873, provided for an election to fill said office in November, 1873 (afterwards decided to be unconstitutional); previous to which election H. and others became candidates for the office at said election. T. was also a candidate for reelection. They entered into an agreement in writing, to abide the result of a primary election, to which their respective claims were to be submitted, and the successful party, to be supported by the defeated aspirants. At the primary election, H. was selected, and in November, 1873, he was elected to the office. In January, 1874, he qualified and took possession of the office, T. surrendering the same. Subsequently the election was decided to be void, and T. brought suit to recover the possession of the office. *Held*, that the surrender of the the office by T. did not amount to such an abandonment of the office as to amount to an estoppel *in pais*.
3. SAME — SAME. — In order to an estoppel by conduct, the following elements must be present:
  1. There must have been a *representation* or a *concealment* of material facts.
  2. The representation must have been made with *knowledge* of the fact.
  3. The party to whom it was made must have been *ignorant of the truth* of the matter.
  4. It must have been made with the *intention* that the other party should act upon it.
  5. The other party must have been *induced to act upon it*. If there is an estoppel, it cannot be by judgment or record, of adjudication nor by matter of deed, but must be by matter *in pais*, of which estoppel by conduct is the key. Bigelow on Estoppel, 473-480.
4. SAME — TRANSFER OF OFFICE FROM ONE TO ANOTHER — If an office may be transferred from one to another, in the mode attempted, no elucidation is necessary to expose the evils which might flow from repeated changes, which the sanction of the claim of the respondent, to the ex-



---

 Brief for plaintiff.
 

---

- tent required, would render possible. 37 N. Y., 817; 4 N. Y., 449; 3 Kent's Com., 588, top p. 11 ed., part 6 (of officers).
5. SAME — VACANCY — HOW CREATED. — If a state or county officer is found to be an idiot, lunatic, or of unsound mind, or guilty of a felony or infamous crime, corruption or peculation in office, gambling with public money, he shall be removed from office. Rev. Code 1871, § 392. If any state, district or county officer shall remove out of the state, county or district for which he was elected, the office shall thereby become vacant. Rev. Code 1871, § 393. And the board of supervisors have the power to order elections to fill vacancies in county offices. Rev. Code 1871, § 1373.
  6. SAME — CASE IN JUDGMENT. — In order to create a vacancy, the party holding the office must permanently disable himself from performing the duties of the office, by himself or deputy, or he must, by act or declaration, manifest a clear intention to willfully abandon the office and its duties.
  7. OFFICE — ABANDONMENT THEREOF — ESTOPPEL — Where an officer abandons an office voluntarily, and another enters upon its duties under color of right, such a one is a *de facto* officer, and can only be ousted by the judgment of a court at the suit of the state. Such abandonment amounts to a resignation of the office, and the party is estopped from setting up any claim to the office. *Alexander v. Walter*, 8 Gill, 253; *Colton v. Beardsley*, 38 Barb., 45. Per SIMBALL, J.

ERROR to the Circuit Court of Winston County. Hon. J. A. ORR, Judge.

The facts of this case are very fully set out in the opinion of the court.

*W. L. Nugent*, for plaintiff in error:

The only question involved in this case is, did the agreement between the parties, accompanied by the voluntary surrender of the office in January, 1874, operate as an abandonment thereof, and estop the plaintiff in error from asserting his rights as the lawful clerk of Winston county? The election law of April, 1873, has been pronounced unconstitutional by this court, and the defendant in error is not the clerk of said county. He has nothing but possession, and can only justify his possession upon the idea of a vacancy. An office not filled according to law is vacant, but when it has been duly filled and the party elected has been com-

---

Brief for plaintiff.

---

missioned and qualified, and entered upon the discharge of its duties, as in this case, there can be no vacancy until the term of service expire, or the death, resignation or removal of the person appointed. *Johnston v. Wilson*, 2 N. H., 202. The statute defines the cases in which a vacancy in office exists, and none of them are applicable to the case at bar. Certainly it would not be contended that the plaintiff in error, by the mere making of the agreement referred to in the pleas, resigned or vacated the office devolved upon him by his election in November, 1871, and his qualification in January, 1872. I am willing to admit that any voluntary act on the part of an officer which *permanently disables* him to perform the duties of his office would amount to a *constructive resignation* by abandonment. It was so held in *State v. Allen*, 21 Ind., 516, where the officer enlisted in the service of the United States as a volunteer. But there could be no such thing as an abandonment in law of the office in this case. *State v. Baird*, 47 Mo., 301. The facts are that the plaintiff in error entered into the agreement upon the idea that the election of his apponent in November, 1873, was valid, and that the surrender to him was a duty he owed the public. As soon as the question of the constitutionality of the act under which that election was held was decided he commenced proceedings to reclaim the office to which he was rightfully elected, and which, under a clear mistake he had surrendered. More than this, the proof shows that the defendant in error, when let in possession, agreed that if the law referred to was pronounced invalid, he would restore the possession to the plaintiff in error. To justify the idea of an *abandonment* there must have been a vacating of the office without any desire that any other person should acquire it. Here there was a surrender upon an *express agreement* and with the *fixed* intention that the defendant in error should become the possessor. The *bona fide* of the parties, who acted upon the idea that the law was constitutional, is apparent, and had the agreement been fairly carried out, there never would have been any necessity for this suit.

---

Brief for plaintiff.

---

It is a familiar rule in the law of contracts, that, if, after knowledge of a supposed fraud, surprise or mistake, a person performs his agreement in part, he will be considered as having waived the objection, but I have never heard it contended that an officer duly elected, commissioned and qualified, and who has actually taken possession of his office, can waive his rights. He may renounce them by resignation, or removal from the county, but not waive them by any such acts as charged. An office is a right to exercise a public *function or employment* and cannot be made the subject of barter between individual claimants. The court below regarded the office in dispute simply in the light of private property. The public, and the rights of the public, were ignored, and questions of public policy disregarded. The office was created by the constitution for the public good, and the plaintiff was elected to fill it, was qualified and entered upon the discharge of the duties incident to it. He was, as to that office, a public agent or trustee, had no proprietary interest or private property in the office beyond its constitutional term and its fees and emoluments. *State v. Dewa, R. M. Charlton*, 377; *Smith v. New York*, 37 N. Y., 318. If the defendant in error was let into possession upon any such agreement as is alleged in the pleas, unless explained as hereinbefore stated, both parties to the transaction would be liable as for an offense at common law, the agreement being absolutely void upon the plain principles of public policy. *Gray v. Hook*, 4 Comstock, 419; 3 Kent Com. sub page, 456.

Nor does the doctrine of *estoppel* apply. The question is not as to the fees received by the defendant in error prior to the demand made for a surrender of the office, according to the terms of the agreement, but as to the office itself. An attentive examination of the cases cited by adverse counsel, *Wammack v. Holloway*, 2 Ala. N. S., 31, and *Colton v. Beardsley*, 38 Barb., 34, will show that they have no application whatever to the present controversy.

---

Brief for defendant.

---

A. H. Handy, for defendant in error, insisted :

1. That as to the individual and personal interests of relator in the profits of the office, he is clearly precluded from asserting them against the defendant in error, by his agreement and surrender of the office to him in pursuance of that agreement, and cited in support of this: 2 Story's Eq. Jur., §§ 1540, 1548; 2 Smith's Lead. Cases, 642 (ed. of 1855); 13 Wallace, 233; 8 Gill (Md.), 251. And this principle applies to claims to a public office, even though there was, at the time of the relator's entering into the agreement or delivering up possession of the office, no vacancy in the office. *Regina v. Greene*, 2 Queen's Bench, 460; *Colton v. Beardsley*, 38 Barb., 29. Although the state would not be precluded from questioning the respondent's right to the office, in behalf of the public, the relator under the circumstances of this case, is estopped.

2. Respondent being elected at the regular election in November, 1873, and having given bond, which was approved by the board of supervisors, and having entered upon the duties of the office, is clerk *de facto*.

3. That relator, having voluntarily abdicated and surrendered the office has, in law, resigned. No particular form of resignation being fixed or required by law. *Wall. C. C. Rep.*, 119.

4. That whether the agreement between the parties was illegal as against public policy, the relator who was a party to it cannot come into a court of justice and claim the benefit of the illegality. In such cases the rule applies *potior est conditio possidentis aut defendentis*. *Coulter v. Robertson*, 14 S. & M., 28; *Holman v. Johnson*, Cowper, 343.

5. There must be a demand as the statute requires, made for the office before instituting proceedings.

R. G. Rives, on same side, filed an elaborate brief, making substantially the same points and relying upon the same authorities.

TARBELL, J., delivered the following opinion :

---

Opinion of the court.

---

This is a contest to determine the right to the office of chancery clerk of Winston county. Turnipseed was elected to the office in 1871, for the full term of four years. Hudson was elected to the same office in November, 1873, under the act of April 21 of that year. The act referred to having been declared unconstitutional, and the election thereunder null and void, the right of Hudson rests upon the statements contained in his fifth plea to the information filed by Turnipseed. The material averments of that plea are these: That in accordance with an act of the legislature of the state of Mississippi, approved the 21st day of April, A. D. 1873, an election was duly ordered to be held in the county of Winston, on the first Tuesday after the first Monday in November, 1873, for the office of clerk of the chancery court of said county, and that prior to said election and while the said Turnipseed was in the possession of the office, he Turnipseed, Hudson and others became candidates for said office at said election, and in the month of August prior thereto, entered into an agreement with each other, in writing, by which each pledged his sacred honor to abide the decision of a primary election to be held on the second Tuesday in September, for the purpose of determining to which of said candidates the other should yield his vote, influence and support for the said office; that at the primary election Hudson was selected as the candidate, and thus became entitled by the agreement to the vote, influence and support of Turnipseed for the said office; that at the election in November, Turnipseed cast his vote for Hudson; that Hudson was declared duly elected by the proper authorities; that he took the oath of office and executed the bond required by law; that on the first Monday in January, 1874, Turnipseed voluntarily and of his own accord, without demand of Hudson, delivered to him the keys of the office, together with the books, papers, records and furniture belonging thereto; since which time Turnipseed has wholly neglected to perform the duties of the office; and that said duties have been discharged by Hudson, who has claimed to act in his

---

Opinion of the court.

---

own right, with the full knowledge and consent of Turnipseed. Upon the judgment of this court pronouncing the act for the election of chancery clerks and others in 1873, unconstitutional and the election thereunder void, this proceeding was instituted. The testimony is quite voluminous, much of which is wholly immaterial. On the part of Turnipseed it was contended and positively stated in the evidence, that on surrendering the office to Hudson, he did so upon the understanding, mutually assented to, that his retirement was subject to the decision of the supreme court upon the statute under which Hudson was elected; that is, if the law directing the election should be declared unconstitutional, then he, Turnipseed, would reclaim the office; but that these declarations were made to Hudson and that they were acceded to by him, are as positively denied on his part, by himself and his witnesses. The circuit court held adversely to the relator on the law and the facts, whereupon the latter prosecuted a writ of error.

There were several pleas, replications and demurrers by both parties, which were acted upon by the court below. It is now sought to base error upon the action of that court in this regard, and it is urged that certain of the demurrers ought to have been extended to the information; but the merits of this case are fully presented in the record; they could not be more clearly exhibited upon another or any number of trials; and no question of pleading or other technical point of any practical importance is conceived to be involved. On the contrary, the case is one, as is believed, calling for a decision on its merits.

The propriety of this course is confirmed, from the fact that estoppel *in pais* depends upon the evidence and not upon the pleadings. *Herman on Est.*, 560; *Bigelow do.*, 590, and cases cited in notes; *Alexander v. Walter*, 8 Gill., 240, the latter being an action of ejectment, in which it was held that matter of estoppel *in pais* was the subject of evidence and not of plea.

It is considered, therefore, that the second cause assigned for error only need be discussed, *viz.*: that "the court erred in decid-

---

Opinion of the court

---

ing the issue of law and fact for the defendant, and in dismissing the petition."

In view of the unconstitutionality of the act of April 21st, 1873, and of the illegality of the election thereunder, the respondent is without right or defense, unless: 1st. He can invoke the doctrine of estoppel; or 2d. Unless there is a vacancy in the office in dispute, caused by the acts of the relator, whereby he has forfeited his title thereto.

If there is an estoppel it cannot be by judgment or record of adjudication, nor by matter of deed; but must be by matter *in pais*, of which estoppel *by conduct* is the key (Bigelow on Est., 473). After a full discussion of the subject, this author says all of the following elements must be present in order to an estoppel by conduct:

1. There must have been a *representation* or a *concealment* of material facts.
2. The representation must have been made with *knowledge* of the facts.
3. The party to whom it was made must have been *ignorant of the truth* of the matter.
4. It must have been made with the *intention* that the other party should act upon it.
5. The other party must have been *induced to act upon it*. *Ib.*, 480.

And in this summary all the authorities concur.

In the case at bar, there has been no *representation* or *concealment* on the part of the relator; there has been no *ignorance* on the part of the respondent; nor, has the latter been *induced* to act, to take any step, or to change his position or conduct in any respect whatever, in consequence of anything said or done, or withheld by the relator. On the contrary, both these parties were deluded or impelled by the act of the legislature ordering an election. The record discloses an active public sentiment in favor of a pledge on the part of the several candidates for the office of

---

Opinion of the court.

---

chancery clerk to abide the vote of a primary or nominating election. To this sentiment the relator evidently yielded with reluctance. The signature of the relator to the pledge, however, had no influence whatever on the conduct of the respondent; for, in testifying on his own behalf he says, he preferred that the relator should not sign it, as that action by Turnipseed, in the opinion of Hudson, would have contributed to the success of the latter. He further testifies that he notified the relator that he was a "standing candidate" for the office in controversy, substantially, at every opportunity and on all occasions, until he should succeed. Hudson and several of his friends were active and vigilant in their movements and operations to secure the position to him, uninfluenced by any word or act on the part of Turnipseed, as Hudson was a candidate whether Turnipseed did or did not subscribe to the pledge, which was evidently but a means to an end, and not the production or the suggestion of the relator. Hudson testifies in the most positive language, that he had no understanding or agreement whatever with Turnipseed beyond that contained in the pledge subscribed by all the candidates. That pledge, like all others of the kind, was a part of the political canvass, intended to work out for some one of those subscribing it, induction to an office. It was a part of the complication of party politics by which a certain result was designed; an operation of doubtful policy, as its effect can only be to limit and restrict the choice of the people at the polls. It narrows their choice by political management to a single candidate, whereas in our form of government it is desirable that candidacy should be as untrammelled and as free as our institutions. Independently of this view, however, the pledge in this case, according to the testimony of the respondent, had no influence on his action, one way or the other, and this is utterly fatal to the theory of an estoppel. On this point all the authorities cited by counsel, and all others accessible, have been carefully examined. *Alexander v. Walter*, 8 Gill., 289; 2 Story's Eq. Jur., § 1546; and others.



---

Opinion of the court.

---

The doctrine under discussion is stated with rare terseness in *Dezell v. Odell*, 3 Hill, 215. Goods were seized under an execution and delivered to the defendant, upon his receipt, stipulating to redeliver them to the officer. The receipt was ruled to be an estoppel in an action by the officer against the receiptor. The court say: "We have the clear case of an admission by the defendant, intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This is the very definition of an estoppel *in pais*. For the prevention of fraud, the law holds the admission to be conclusive."

And the doctrine is also briefly and accurately stated in *Taylor v. Zepp*, 14 Mo., 482. To establish estoppel *in pais*, the court say there must be: 1. An admission inconsistent with the evidence offered to be given, or the claim offered to be set up. 2. Action by the other party upon such admission. 3. Injury to him by allowing the claim to be disproved.

For the purpose of testing the case before this court, the respondent's statement of it may be accepted as embracing the case presented for adjudication. According to his own testimony in the cause, there was no admission, statement or act by the relator which was intended to or which did in fact influence his conduct. They were not dealing together, but were acting independently, if we accept the case made by the latter. Hence, there was no fraud, at least, on the part of the relator towards the respondent, for the latter was not governed in his line of conduct or influenced by any act of the former. On the contrary, taking the whole record together, it is palpable that the relator, rather than the respondent, was led into a line of conduct prejudicial to his interests by the act of the legislature and by the manipulations of active partizans. Within all the authorities — *Bigelow on Est.*, ch. 19; *Herman's L. of Est.*, sec. 442; *ib.*, ch. 12, and cases cited by these authors; also, cases cited in *Phillips v. Cooper*, MSS. opin-

---

Opinion of the court

---

ion, present term—the pledge and the surrender are open to denial and explanation, and the case is without a single element of estoppel.

It has been urged that it is ungracious in the relator to seek to evade the pledge. With reference to this fact, it has been observed that, in limiting the number of candidates to be voted for at the regular election, it had served its purpose. It may be further remarked that, if the case made by the respondent be alone accepted, the attempt to interpose the pledge to defeat the relator comes with an ill grace from the former, whose conduct, he testifies, was wholly independent of the course of the relator. But it is on the ground of public policy that the acts of the relator, set forth in the record, shall not be allowed to change the tenure of an important public office, and not upon any ground between the parties. *Holman v. Johnson*, Cowper, 343.

There is another view of this pledge quite as conclusive against the theory of the respondent, as the suggestions already made, viz: that it is contract or promise of future action, and not a “representation,” such as enters into or constitutes an element in the law of estoppel. At most, it is but the expression of a present intention, which the party is at liberty to change. If an action on this agreement were instituted by Hudson for the recovery of damages for nonperformance, the obstacles and result may be anticipated without suggestion. *Bigelow on Est.*, 481; *Langdon v. Doud*, 10 Allen, 433; *Howard v. Hudson*, 2 El. & B., 1; *Audenried v. Bitteby*, 5 Allen, 382; *Plumer v. Lord*, 9 ib., 455; *Jorden v. Money*, 5 H. L. Cas., 185; *White v. Walker*, 31 Ill., 422; *Harris v. Brooks*, 21 Pick., 195.

Reference is made to *Colton v. Beardsley*, as stated in *Bigelow on Estoppel*. As therein presented, p. 522, that case is almost conclusive of the theory of respondent, but its examination in the reports, 38 N. Y., 29, shows it to possess no feature like the case at bar. The action was trover against school trustees for the taking and conversion of certain property. The plaintiff, to prove

---

Opinion of the court.

---

his case, gave in evidence two warrants for the collection of taxes for school purposes, issued by the defendants, under which the collector seized and sold the property of plaintiff. On cross-examination the defendants asked the plaintiff's first witness if, at the several dates of the warrants, they were not acting trustees. The question was objected to, on the ground that the defendants could not show themselves trustees by reputation, or by proving their own acts. The objection was sustained, when the defendants presented the records of the school district, upon the face of which the question arose whether Colton instead of Beardsley, was not a member of the board of trustees. Colton was elected trustee in 1854, for the term of three years. Prior to the expiration of this time, and in 1857, Beardsley was elected in place of Colton, on the ground of a vacancy, by the neglect or refusal of the latter to serve. He had never signified his acceptance, nor discharged the duties of the office; was present at the meeting of the inhabitants of the district, when Beardsley was elected in his place, as in case of a vacancy; and knew that B. entered upon the duties of the office, without interposing any objection or claim in his own behalf. The statute of N. Y., bearing upon the case, declares that a vacancy in the office of trustee may be occasioned by death, *refusal to serve*, removal, etc. The evidence to show that Colton was trustee was simply his election and residence in the district. It was not pretended that he accepted or served. Hence a vacancy within the letter of the statute. The case was decided by three of the four judges composing the court, and opinions by each of the three, two concurring in the judgment rendered, and the third dissenting. The points of concurrence between the two concurring judges it is not altogether easy to determine, but it is believed that the only essential point of agreement is in this, that the trustees had made out a *prima facie* defense, which required proof to overcome. They had offered to establish their official character by reputation, and acts, as such, extending through a period of several months. This evidence was rejected, and on

---

Opinion of the court.

---

this ground the judgment of the circuit court, wherein the plaintiff recovered, was reversed and a new trial awarded. The dissenting judge was of the opinion that the trustees should show themselves such *de jure*, which he insists was the only question for determination. With reference to the doctrine of estoppel, one of the two judges on whose concurrence the rulings on the trial were reversed, makes these remarks only: "Again, were it necessary, the plaintiff should be held estopped from denying the defendant's title to the office. He was present at their election, remained silent when the office was being filled, as vacant, made no objection when it was filled, and without objection saw the defendants enter upon the duties and assume the responsibilities in said office, himself neglecting to act in his, now claimed, official character."

The other concurring judge merely says: "It is unnecessary to inquire whether his acts do not amount to an estoppel, to his alleging that his office was not then vacant; although my impression is that it should have that effect."

That was an election under a valid and subsisting statute, which declares a vacancy upon a refusal to serve, in which case the remaining trustees can convene the inhabitants, who, when assembled, are empowered to fill vacancies. In that case, the person first elected, after wholly neglecting to accept the office or to discharge its duties, attended the meeting, when his place was filled, as in case of vacancy, he, remaining silent, and without objection, saw his successor qualify and enter upon the duties of the office, which were performed by the latter for several months, and until the plaintiff's property was seized and sold for taxes, before any question was raised as to the legality of the second election. Colton then sought to contest the right to the office in the action which he instituted for the cause already stated. This was held by the concurring judges an attempt to attack title to an office in a collateral proceeding, which they also agreed could not be done. Upon this point the same dissenting judge was of the opinion that title to the office was directly in issue, and to justify, the defendants

---

Opinion of the court.

---

must show themselves trustees *de jure*. The majority held they had shown themselves *prima facie* trustees *de jure*.

It may be repeated that there was no evidence offered to show that Colton ever accepted or served; there was evidence of his refusal to serve within the statute creating a vacancy; no proof was offered to show that Beardsley was not elected to an actual vacancy; there was only proof of Colton's election nearly three years prior to the election of Beardsley to his place, as in case of vacancy, and his residence in the district; there was an election to fill his place as in case of vacancy by his refusal to serve; he was present at the meeting, unobjecting; permitted his successor to qualify and assume the office; and only objected several months thereafter, when his property was seized and sold by the school district tax-collector, under warrants signed by the several trustees, including the trustee chosen as his successor. The circuit court ruled that, *prima facie*, there was no vacancy, and that the trustees must show they were such *de jure*.

The appellate court held that, *prima facie*, there was a vacancy, and that, *prima facie*, also, Beardsley was trustee, and further, that official character may be established, *prima facie*, by oath and reputation, upon which grounds, the judgment of the circuit court was reversed.

Two points of concurrence in that case may be added by way of further showing its clear contrast with the case at bar. 1. It was held that, under the statutes of New York, regulating affairs of school districts, the trustees and the inhabitants, when convened in school district meeting, were invested with power, in their judgment and discretion, to determine whether there was a vacancy, as in that case, and, that said determination was final until reversed or set aside by a direct proceeding for that purpose. 2. That a refusal to serve, whereby, under their statute, a vacancy was created, was clearly shown; that the inhabitants of the district so understood and acted upon it, and that the plaintiff's presence at the filling of the vacancy, and subsequent conduct, approved their understanding and ratified their acts.

---

Opinion of the court.

---

Thus much time and space have been given to the case of *Colton v. Beardsley*, because of the very erroneous impression conveyed by the statement of it in *Bigelow* on *Estoppel*, with a view to show its want of analogy to the case at bar.

Another case cited by counsel (*Regina v. Green*) ought, perhaps, to be briefly noticed. Search has been made in the report, but it can be found only as given in *Bigelow*, 565, and *Herman*, 535. That was a motion for a *quo warranto* against the defendant for exercising the office of councillor when disqualified by the statute. His election was under a valid and subsisting law. The relator was well acquainted with the intention of the defendant to become a candidate; he was present when the defendant was elected and acquiesced in his election; the election was declared and published; no notice of the disqualification was given at the time of the election or publication; in fact, the relator was chairman of the meeting at which the defendant was appointed to office, and administered to him the oath of office or declaration required by law. The court very properly held, as far as can be judged from the statement of the case by Mr. *Bigelow*, that the relator could not be heard to question the right of the defendant. The court make the significant suggestion of a distinction between a judicial and a ministerial act in the induction of another into office. The relator, in administering the declaration to the defendant, by which the latter was inducted into office, acted judicially, whereas, if he had acted ministerially, the court say, the case would have been otherwise decided.

Mr. *Herman*, in his work on the law of estoppel, gives three or four lines to the foregoing case only. According to this author, the defendant was "induced" to take the office and was inducted into it by the relator, who, in so doing, acted in his official and judicial character. As referred to by these text writers, therefore, the case is not analagous to the one under consideration.

Another branch of the case before this court will now be discussed.

---

Opinion of the court.

---

It is correctly urged, that the relator must recover, if at all, upon the strength of his own title, and not upon the weakness of the claim of his adversary. *Kimball v. Alcorn*, 45 Miss., 151.

And, in this connection, it is insisted, that the pledge and the surrender were equivalent to a resignation, or an abandonment of the office. It is apparent, from the authorities, that, had the board of supervisors of Winston county found, in fact, a vacancy upon a hearing, after notice to the relator; had the board, thereupon, ordered an election to fill the vacancy; if such election had been held; had the person, thus elected, qualified and assumed the duties of the office, Turnipseed permitting all this to be done without objection or the interposition of any claim; and, were this contest between him and the person thus holding the office, quite another and different case would have been presented for adjudication. Such a case would have borne a very strong similarity to that of *Colton v. Beardsly*, otherwise, wholly unlike the one one at bar.

As to the pledge signed by the several candidates, it must be held to have very little if any weight in the disposition of the case. It was but the machinery of a political party to bring about, in its own way, the nomination of a candidate for support at the regular election. To this extent, it may, perhaps, be unobjectionable; but beyond this primary purpose, it ought not to have recognition. Its introduction to control the right to an elective office is a use for which it was never designed. At least, beyond this, it ought not to have legal countenance. As a means of effecting the tenure of public offices, it must be regarded as impolitic. If an office may be transferred from one to another in the mode attempted, no elucidation is necessary to expose the evils which might flow from repeated changes, which the sanction of the claim of the respondent, to the extent required, would render possible. *Butts v. Wood*, 37 N. Y., 317; *Gray v. Hook*, 4 id., 449; 3 Kent's Com., § 588, top p., 11th ed., part 6, sec. LII, "Of Offices," et seq.

---

Opinion of the court.

---

Were the acts of Turnipseed, including the pledge and surrender, tantamount to a resignation? Did those acts create a vacancy in the office in controversy? Was there in fact or in law a vacancy?

The provisions of the code, bearing on these questions, are these:

"§ 292. If any state or county officer, shall be found, by inquest, to be an idiot, lunatic, or unsound in mind, during the the period for which he is elected, or shall, during that time, be found guilty of felony, or any infamous crime, corruption, or speculation in office, or gambling with money which may have come into his hands by virtue of his office, or shall be removed from office by sentence of any court of competent jurisdiction, the office held by such person shall be thereby vacated, and the vacancy shall be supplied as by law directed."

"§ 393. If any state, district, or county officer, shall remove out of the state, district, or county, for which he was elected, during the term of his office, such office shall thereby become vacant, and the vacancy shall be supplied as by law directed." \* \*

If the code declares a vacancy in office for any other cause, the section has been overlooked.

§ 1363, gives to the board of supervisors power, and it is made their duty to "order elections to fill vacancies that may occur in any of the offices of their respective counties."

In *Johnston v. Wilson*, 2 N. H., 202, a vacancy was held to be created by neglect to take the oath of office, and an absolute refusal to perform its duties, except upon terms indicated by the officer and not acceded to by the proper authorities. The court, however, say: "It must be obvious, also, that when once accepted, no vacancy can be said to exist in the office, till the term of service expire, or till the death, removal or resignation of the person appointed." And the terms *resignation* and *nonacceptance* are employed as synonymous, the court saying: "The term used to express a vacancy was immaterial."



---

Opinion of the court.

---

Cummings v. Clark, 15 Vt., 653, presented two questions: 1. Whether the refusal of a highway surveyor to execute a receipt for a tax bill, offered to him for collection by the selectmen, is *ipso facto* a vacating of the office. 2. Had the selectmen a judicial discretion in determining when they might make a new appointment?

To the first question the court reply: "Such refusal is, at most, the omission by such officer of a prescribed duty. The statute does not, in terms, visit any such consequence as that contended for, upon the act complained of. To give it that effect by construction, would be to adopt a principle which, in practice, would render it necessary to fill most offices many times over, before the legal time appointed for a new election by the people."

With reference to the second question, it is said: "The selectmen doubtless, to some extent, had a discretion in the matter; for instance, in selecting a suitable person to fill any vacancy which might occur. But we think a vacancy must have occurred, in order to give them any jurisdiction of the matter. This vacancy must have occurred in one of the modes pointed out in the statute; 'from nonacceptance, death, removal, insanity, or other disability.' Now it cannot be contended that the present case comes under any of the the terms used, unless it be the last, and it would seem to require argument to show that the omission complained of in this case, constitutes no disability to perform the functions of the office, in any such sense as that term is used in the statute. 'Other disability,' must import such like disability as had been before enumerated; that is, such as wholly vacated the office and left it the same as if there had been no appointment. In the present case no such vacancy had occurred, and by consequence, the selectmen had no power to make an appointment, and their proceedings are irregular and void."

The rule stated in *The People v. Carrique*, 2 Hill, 97, quoting *Angel & Ames on Corp.* is, that a resignation by implication may take place by being appointed to and accepting a new office in-

---

Opinion of the court.

---

compatible with the former one. See also, 3 Burr., 1616, and 2 T. R., 87.

It was declared in *Cornwell v. Allen*, 21 Ind., 522, that a temporary disability to discharge the duties of the office, might not of itself, create a vacancy, but that a disability designed to continue for the whole term of office, must vacate the office. In that case, the party enlisted in the army of the U. S. for 3 years, or during the late war. Held, a vacancy was created, because the person by his enlistment, entered into an engagement to leave the county, and state for three years, covering the full term of office.

The case of *Kiel v. Baird*, 47 Mo., 303, was this: K. was elected treasurer of the county of Cooper in 1868, for the term of two years; he duly qualified and assumed the duties of the office; thereafter an information was filed in the county court of that county, in which petition it was averred that K. had been unable to attend to the duties of his office for a period of fifty days; on which information the county court proceeded *ex parte* to inquire into the case, and as a result of such examination declared the office vacant; whereupon the court appointed B. to the office. The court say: "Where is the legal warrant for these proceedings? We are referred to the statute, which provides as follows: 'In case of vacancy in the office of treasurer by death, resignation, removal or otherwise, it shall be duty of the county court of the proper county to fill such vacancy by appointment.' This statute authorizes the county court to fill an existing vacancy, but confers upon the court no power to create the vacancy it is to supply. The statute cited confers no jurisdiction upon the county court to act in the premises until a vacancy actually exists. The pleadings show that there was no vacancy in the office at the time the court assumed to act. The complaint of the county attorney is, that the relator occupied the office, but neglected its duties. That is the substance of his averments."

While the constitution of Mississippi contemplates vacancies in office from various causes, it has been seen that the Code has

---

Opinion of the court.

---

made provision for vacancies in county offices, only by inquest in certain cases, conviction of a felony or other crimes enumerated, or by sentence of removal by a competent court, § 392, and by removal from the county, § 393. Nevertheless, vacancies may otherwise happen, and when they "occur," the board of supervisors may order an election to fill such vacancy. § 1363.

Did a vacancy "occur" in the office in controversy by the acts of the relator? Manifestly, the board of supervisors, as a matter of law, cannot, by adjudication, create a vacancy, though as a question of fact, that body may inquire whether one exists or not. In this case it is a question of law upon the facts, to be determined by a competent tribunal. Although he delivered the office to the respondent, the relator did not remove from the county, nor did he otherwise render himself disabled or disqualified permanently, to discharge the duties of the office. As in the cases cited, there is a clear and just distinction between a penalty for the neglect of official duty, and a penalty involving the vacation of an office. *Spafford v. Hood*, 6 Cow., 478. To hold that the relator has vacated the office involved, would be contrary to a correct public policy, and to punish him for possessing a law abiding disposition, as indicated first, in yielding to the decree of the legislature, then in signing the pledge, and finally in a voluntary surrender, which was at the end of his term, according to the statute that for the time being commanded his obedience.

The true rule in a case like the one before the court would seem to be, that in order to create a vacancy, the party must permanently disable himself from performing the duties of the office, either by himself or deputy, or he must, by acts and declarations, manifest a clear intention to willfully abandon the office and its duties — an intention not shown by the record.

Holding the order of the board of supervisors declaring a vacancy in the office in dispute, standing alone unacted upon, to be nugatory, this case is narrowed down to the single question, whether the delivery to the respondent was a resignation by im-

---

Opinion of the court.

---

plication, so as to create a vacancy. No determination on the part of the relator to abandon the office, in any sense of that term, within the authorities, is manifest. On the contrary, he did not desire to vacate. It is apparent that he was deluded by the unwise and illegal statute, and by the complications of the canvass, before which, he, perhaps, too readily yielded, but that he willfully abandoned the office in any legal or proper sense of the term; or from a determination to vacate it because he did not wish to hold it, is a proposition wholly inconsistent with the record, unwarranted by the precedents, and absolutely the reverse of the intention of the relator. In view of this discussion, the case at bar may be summed up in this: that both these parties acted under a delusion caused by what proved to be an illegal statute and a void election; that Hudson acted upon no representation, expressed or concealed, of Turnipseed, but upon the statute referred to; and that the relator delivered the office to the respondent, not from a desire, purposely or willfully, to abandon the office and its duties, but in obedience to a law of the legislature, approved by the governor, and its enforcement threatened by the local district attorney. When the act which has caused this litigation was declared unconstitutional, the relator demanded of the respondent a restoration of the office to which, upon the record and the authorities as they are understood, he was legally and equitably entitled. It would not be a sound public policy to permit parties to treat an office as a "mere toy" for "amusement, subject to be taken up, laid down and taken up again at will."

Judgment of the circuit court reversed and judgment final here.

SIMRALL, J., delivered the following dissenting opinion:

Not being able to concur with the majority of the court, I present very briefly, as required by law, the reasons therefor. This is purely a controversy between the parties, to the property in the office, and as incident thereto, its emoluments. The proceeding instituted by Turnipseed had for its object the recovery of

---

Opinion of the court.

---

the office held and enjoyed by Hudson. Principles may have fit application to this litigation, which would have no place if the state were proceeding to eject the incumbent as not having a legal right to the office.

The question is, whether Turnipseed can recover the office, and not whether Hudson is *de jure* invested with it. It may be true (as is conceded on all hands), that Hudson has no better right than a *de facto* incumbent, having entered under claim and color of right; and it may be also true that the relator is not as against him, entitled to the office.

The view that I take of the case is, that Turnipseed abandoned the office and gave way to its occupancy by Hudson, who came in not as a usurper, but under color of right. No set form of resignation is necessary. If Turnipseed voluntarily retired from the office, and Hudson was admitted to it under the forms of law, though not rightfully inducted, then Hudson is strictly *de facto* clerk, and can only be ousted by the judgment of the court at the suit of the state.

It is a well established fact, that from and after the first of January, 1874, Turnipseed altogether ceased to discharge the functions and duties of the office; that all the books, papers, records, the seal and other insignia of office, were laid down by him and formally taken up and used by Hudson.

Looking to the circumstances under which Turnipseed divested himself of the office, and Hudson entered upon it, and it is plain to my mind that the respective acts of the parties meant a vacation of the office on the one side, and its acceptance and occupancy on the other.

These are the prominent facts. It was doubtful whether a legal election for the particular office could be held in November, 1873. Both parties desired to become candidates for the office, and agreed with each other to submit their respective claims to the nomination to a primary meeting, whichever received the nomination the other to give him his support and vote. Hudson got the

---

Opinion of the court.

---

nomination, became the candidate, and was elected, Turnipseed voting for him. On the first of January Hudson executed a bond, which was approved by the board of supervisors, took the oath prescribed by law, and actually entered into full possession of the office, with all its records and paraphernalia, with the acquiescence and consent of Turnipseed, and continued without let or dispute, to perform its functions, for about four months, when the relator made his claim. The conduct of Turnipseed, throughout, was voluntary, without duress or constraint. He retired from the office, under a mistake of law, or rather with the doubt still unsolved, under which he seems to have acted, but that does not detract from the freedom of his conduct, nor destroy the legal effect of a most orderly and deliberate abandonment or resignation of the office.

Hudson, upon his retirement, entered, under color of right, his certificate of election, his bond approved and oath of office. There is not an element of usurpation, but a fulfillment of every requisite laid down in the books to constitute him a *de facto* clerk.

Turnipseed agreed with Hudson that if the latter should receive the nomination, and be chosen at the November election, in which he would assist with his vote, then he, Turnipseed, would retire, and let Hudson take the office. Such an agreement, in a suit for its enforcement, or for its breach, would have amounted to nothing; nor would Hudson's election have conferred a right, if Turnipseed had not *in fact* actually vacated the office, and Hudson had not become invested with it, under color of right as before stated.

The legal effect of the acts of Turnipseed was a voluntary abandonment or resignation. Before it actually occurred, he came under an agreement to do so contingently. The contingency happened — and thereupon, in the most open and notorious manner, he retired. He contributed to place Hudson in office. He delivered to him the property and seal. The board of supervisors approved his bond, and swore him in. The state has ac-

---

Opinion of the court.

---

quiesced, by sufferance, and thereby ratifies and affirms his acts as valid. Turnipseed, in the most solemn form, has recognized Hudson as clerk; the county authorities; the state, by her acquiescence and sufferance; the public, who have interest in his acts; all, have recognized him. Nor has his right been challenged, by any person, except the relator, and that not until several months after unquestioned possession. It is too late now to repent, and reclaim what he had voluntarily given up.

This is not the case of a casual or temporary refusal to perform the duties of an office, but rather of a deliberate and public abandonment of it — which, in law, is a resignation. If Turnipseed has ceased to be the clerk, he has no right to contest the claims of the defendant, Hudson. In support of these views, I refer to *Alexander v. Walter*, 8 Gill, 253; *Regina v. Green*, cited in *Bigelow on Estoppel*, 565; *Colton v. Beardsley*, 38 Barb., 41, 51; *Church v. City of Milwaukee*, 31 Wis., 518, 519.

The authorities show, that the doctrines of estoppel, in proper circumstances, apply to the claimant of an office. Does not the principle and the reason of it, speaking through the facts of this case, preclude the relator from asserting a right to the office? A party is sometimes, not permitted to deny that which he has solemnly and deliberately adopted and received as true. *Herman on Estoppel*, § 9, p. 11.

It has been well said by Mr. Bigelow on *Estoppel*, 481: "At the present day, estoppel is never employed to exclude the truth; its whole effect is to preclude parties and those in privity with them from unsettling a matter which they have in solemn form admitted or adopted."

The circumstances of this case meet the several requisites of an estoppel *in pais*, defined by Mr. Bigelow, p. 600:

First. Turnipseed, by his agreement with Hudson, his participation in the election and voting for him, his withdrawal from the office, so that Hudson might qualify and take possession, has done acts which influenced Hudson, and utterly inconsistent with the claim he now sets up.

---

Syllabus.

---

Second. Hudson has gone forward, and shaped his conduct by these acts of Turnipseed.

Third. Hudson will be injured, by allowing Turnipseed to deny all these acts and admissions, and assert his claim to the office.

---

M. McLAUGHLIN v. JOSHUA GREEN et al.

1. **MILITARY ORDERS—DESTRUCTION OF PROPERTY.**—About the close of the late war, and after the surrender of the confederate forces, east of the Mississippi River, General Tucker, commanding a district including the city of Jackson, issued a military order, directing defendant Green, commanding a militia company, to destroy all the spirituous liquor in the city of Jackson. Under said order the liquor of plaintiff was destroyed. M. sued G. and others for the value of the property. The defendant sets up this military order in justification, and insists that the order was necessary as a means of protecting the city of Jackson from destruction by drunken soldiers, who had been paroled, and were threatening to burn the town, and were searching for spirituous liquor. *Held*, that if it is subversive of all civil rights, and places the civil authorities in absolute subordination to the military, to instruct the jury, to the effect, that a military officer in command of a district, has power to deal with private property, and may, if in his judgment it is fit and proper, order it to be destroyed, and that those who obey are protected by the order.
2. **MARTIAL LAW—WHEN IT OBTAINS, AND WHEN IT CEASES.**—In defining when martial law may rightfully obtain, it is limited to the theatre of active military operations, when no civil authority remains, and there is a necessity to furnish a substitute to preserve the safety of the army and society, and martial rule can only prevail until the laws can have their free course. General Tucker being in command, with head quarters at Jackson, did not supersede the civil authorities, state or municipal, within the scope of his command. His duties were purely military, without right to interfere with private citizens or their property, except within the limits here defined.

ERROR to the Circuit Court of Hinds County (1st Dist.). Hon. GEO. F. BROWN, Judge.



---

Statement of case.

---

Plaintiff in error brought his suit against the defendants in error, to the December term, 1865, of the circuit court of Hinds county, in trespass to recover the value of seven barrels of whisky destroyed by the defendants. Defendants pleaded the general issue at the return term, and filed a notice of certain proof which they could offer under the general issue at the trial term. One trial was had and a verdict rendered for the defendants, and the case was brought to this court and reversed, and a new trial ordered; the case went back to the circuit court and was tried again, and a verdict rendered for the defendants. A motion was made for a new trial, which was by the court overruled, and the case is again brought to this court on writ of error.

The following is assigned for error:

1. The court erred in suffering notice to be filed at the trial term herein of an intent to prove matter in justification of the trespass alleged, after four terms of the court had elapsed, after a former reversal herein, and in point of time, just at the verge of trial.

2. Because the instructions given for plaintiff and defendants respectively, are calculated not to instruct, but to confuse and mislead the jury, being in terms contradictory and wholly irreconcilable.

3. The court erred in refusing to give instructions marked No. 1, 5, 6, 7, 9 and 10.

4. The court erred in granting instructions marked 1 and 2, for defendants, the same being contrary to law, vague and contradictory, the one styling Gen. Tucker a "Dist. Commander," and the other "the commander of a department."

5. The court erred in charging the jury in such terms as precluded them from trying the fact as to the legality and validity of the order, filed as the order of Gen. Tucker, assuming its legality, encroaching upon the province of the jury, and forestalling their verdict.

6. The verdict was contrary to the law as charged and the evidence as adduced.

---

Brief for plaintiff.

---

*W. P. Harris*, for plaintiff in error :

In this case, the court is required to determine the value and efficacy of the security which we have, under our constitution and laws, for private property.

It may be affirmed that when private property is taken or destroyed, unless in the exceptional case of overwhelming necessity, there is responsibility somewhere to make good the loss to the owner. In this case there was panic only, and that ought never to be made the substitute of necessity. *American Print Works v. Lawrence*, 3 *Zabriskie* (N. J.) Rep., 590, and cases there cited.

It is therefore a case in which it is necessary for those who actually destroyed the plaintiff's property, to show legal authority for the act, and the evidence on this point must be definite and unmistakable. All forms of public authority, and all those entitled to exercise it, are defined by law. The military code under which General Tucker assumed to act, confers no power to destroy private property in the circumstances of this case; and, moreover, he was simply in command of a military post, after military operations had ceased. In point of fact, at the date of the order, the army to which he was attached had surrendered—war had ceased. We look in vain to the civil code for the authority here asserted. The act of 1864, p. 65, relied on to sustain the forcible destruction of the plaintiff's property, will be found not to apply.

That act indicates the persons authorized to destroy distilleries, and declares whisky kept for sale a common nuisance. The defendants are not the officers or persons so indicated. The legislative declaration that whisky kept for sale is a common nuisance, if designed to subject it to destruction by any person or combination of persons, whose antipathies might impel them to destroy it, is clearly unconstitutional.

The right to abate a common nuisance is limited to the destruction of those things which in themselves violate a common right, such as obstructions in highways. Here the whisky is not declared a nuisance as such, but a nuisance only on account of the

---

Brist for defendants.

---

unlawful intent of the owner in regard to its use. For this intent the law adjudges forfeiture, but the intent must be judicially ascertained, otherwise the act is plainly in violation of the Bill of Rights. Sedgwick's Const. & Stat. Law, 540.

*C. E. Hooker*, on the same side:

1. The Rev. Code of 1857, p. 493, gives authority to the defendant to file notice of proof under the general issue, but, to avail himself of this statute, it must be pursued strictly, and it was not pursued in this case. The suit was brought in December, 1865, and the notice was not filed until the trial term, 1872. 41 Miss., 599.

2. No military order is binding after the government has ceased to exist. It was the gravamen of the defense, that an order had issued, and from a person possessing the authority to issue it, and in refusing to give the plaintiff's fifth instruction, the court virtually said to the jury, that the plaintiff could not be permitted to show the invalidity of the order under which the defendant attempted to justify the trespass laid in the declaration.

*T. J. & F. A. R. Wharton*, for defendants in error:

I. As far as the giving or refusing instructions by the circuit judge is concerned, we think it sufficient to refer to the case of *Ford v. Surget*. 46 Miss. R., 130.

Those asked for defendant and given were founded upon the rules laid down in that case. The following language from the opinion is as applicable to this case as to that: "An order by the military power in the control of the country, with means to compel obedience, directed to be executed by the persons named, is a belligerent, as much so as the strategic movements of an army, or a battle." Apply that principle to this case, the commanding general, Tucker, of this department, gave the order to defendant Green, who was in command of a company and instructed by the proper authority to act under his, Tucker's, orders.

Further from said opinion: "Who is to judge of the propriety of Gen. Beauregard's order through the provost marshal? There

---

Brief for defendants.

---

was no tribunal competent to stay it or adjudge its fitness and validity. Farrar, a subordinate, had no discretion. He was shut up to obey. Those to whom he intrusted its execution bore toward him the same relation that he did to his superior \* \* \* Necessarily, there were many excesses of authority, abuses of power and wrongs done during the late war. In this, the greatest struggle of modern times, employing the utmost energies and resources of the people, when nearly all of them, in one form or another, were participants in the struggle, when the courts, for the most part, were closed, and the laws, in the midst of arms, were silent, or, if they spoke at all, uttered but a feeble voice, it is not to be expected that, in all circumstances, personal rights and private property would be scrupulously respected, or, that those who acted under military orders, were at all times discreet and forbearing. We do not think it would be wise to encourage the exhuming of such transactions of those distempered times for adjudication in the courts \* \* \* The fact that the order was given to Surget and Minor *necessarily implies that they were subject to obey.*"

In his oral argument in this case, Judge HARRIS, in commenting upon the fact that the order to Green is signed by Tucker as "Brigadier Gen'l," said there is no proof of what army he is an officer, or that he had any authority to issue such orders. We reply that the court judicially shows the fact that he was a brigadier general in the Confederate army, and at the date of his order to Green, was in command of the department in which the city of Jackson is located. May we not say that "the fact that the order was given" to Green "necessarily implies that he was subject to obey." The answer is that Green was in command of a military company at Jackson, and required to report to and obey orders of whoever should be, for the time, commander of the department; that Tucker was so in command when he gave the order to Green, under which he and his codefendants acted in his behalf. As it was the duty of Green to obey such orders, so it was the duty of his codefendants to obey his, Green's, orders.

---

Brief for defendants.

---

Whether the orders of either were right or wrong, is a question not to be considered. What would have been the penalty of disobedience and what protection against its infliction? There was a *superior power*, whether legal or not, *ready to enforce the orders* and the penalty of disobedience.

II. As to the objection founded on admission in evidence of the notice of matters of defense, returned or under "general issue," and of any matters of justification or excuse, we reply, the notice was filed January 13, 1871, nearly 18 months before the trial. It was not urged that plaintiff was taken by surprise, nor did he ask for a continuance. Both parties went into the trial on the merits, defendants offering proof in excuse or justification, all matters specified in said notice, and plaintiff offering proof of facts to aggravate the alleged trespass of defendants.

III. We insist that, independent of being protected by the order of General Tucker, defendants in error were justified in their action by act of April 5, 1864, p. 63, "an act to prevent distillation of spirituous liquors, and to declare the distilleries to be public and common nuisances, and to authorize the same to be abated," etc. Section 2, after declaring distilleries to be nuisances, makes it lawful for all officers of the state and Confederate armies to abate and destroy them. Said act suspends all laws licensing the sale of liquors during the war, and forbids the sale in any quantity except for medicinal purposes.

We admit that the judgment of the circuit court is correct, that the ends of justice have been reached, and that the *second* verdict of a jury should not be disturbed, especially as there is no probability that a different result would occur on a third trial.

*W. & I. R. Yerger*, on the same side :

1. While it is true that private property cannot be taken for public use without just compensation being made to the owner, there are times when necessity justifies its destruction, and when the injury sustained is "*damnum absque injuria*." For instance, if a fire is raging in a city, it is perfectly lawful to tear down and de-

---

Brief for defendants.

---

stroy houses liable to the flames in order to prevent the spread of the conflagration; or if a wild beast were loose in the streets of a town, or a mad dog or other rabid animal were at large, it would be perfectly lawful to destroy them for the public safety. This is the great law of self defense which belongs alike to communities and to individuals, and which is never surrendered. The facts of this case bring it within the rule, and the first instruction given for the defense is correct. 2 Kent. Com., 339, 397; 1 Dallas R., 363; 4 Term R., 797; 1 Zabriskie's (N. J.) R., 248.

2. The second instruction for defendant in the court below is not objectionable. The act of 1861 declared the keeping of liquor for sale in this state to be a nuisance, and authorized its destruction. It is so easy to avoid the effect of an unpopular law by pronouncing it to be unconstitutional, that it has become the common recourse of all parties. It is certainly true that there may be nuisances, and that when they become public or common, they may be abated. What is a nuisance, and who is to determine or declare it? Are there no nuisances but such as are so declared by the common law? Where has the constitution limited the power of the legislature to declare and define what shall and what shall not be a nuisance? The legislature may exercise this power arbitrarily or even oppressively, as they may every other power, but still the abuse of the power does not take away the right to exercise it. It is questionable whether opium is a greater poison than whisky. Suppose such quantities of opium were introduced into the state for sale, and were sold in the community in such quantities as to endanger the health and lives of the people, to induce the commission of great crimes, and demoralize the social fabric, would it not be necessary and proper to make the keeping of it for sale a common nuisance? Will it be pretended that the power does not exist, and that the legislature is to determine the time at which it is to be exercised? To say that a man has property in whisky, and that the legislature cannot authorize its destruction, simply begs the question. The same reasoning would

---

Opinion of the court.

---

apply to every other nuisance. There is no legislative power which has been more frequently exercised in England and in this country, than that which defined, declared and punished public nuisances. And there are many things declared by statute to be nuisances, which were unknown to the common law as such. 4 Black. Com., 167; Rev. Code 1857, art. 139, p. 597; Hutch. Code, 943, 944.

SIMRALL, J., delivered the opinion of the court.

The destruction of the plaintiff's whisky complained of as a trespass, occurred just at the close of the active hostilities of the late civil war.

The defendants justified the act by reason of an order issued by Gen. Tucker, commanding a district including the city of Jackson, to Joshua Green, commanding a militia company, directing him to destroy the spirituous liquor in the city of Jackson. That this order was given as a necessary precaution to the safety of the city of Jackson, and the protection of its citizens from the violence of drunken soldiers who had been paroled, and were in large numbers in the city, threatening to burn down the town; were searching for liquor, and when under its influence were utterly incontrolable.

Also that the board of mayor and aldermen (of which the plaintiff was a member), passed a resolution, of which plaintiff approved, to have all the spirituous liquors in the town destroyed, to prevent the soldiers from getting possession of it. These matters were set forth in a "notice" attached to the plea of "not guilty," which under the statute, fulfills the office of special pleas.

It was not controverted that if the seizure and destruction of the whisky was not warranted by the military order, under which Joshua Green and his associates acted, or by the resolution of the city council, or under the pressure and emergency of necessity arising out of the circumstances disclosed in the "notice," then the defendants are trespassers. Wrong does not in the sense of a

---

Opinion of the court.

---

wanton invasion of the plaintiffs property, but rather as the doers of an unlawful act, under color of authority, under the influence of honest motives; and believing that they were performing a duty for the common good. We are satisfied that if liable at all, it is only for the value of the property destroyed, and not for vindictive or punitive damages.

It would seem from the record that the defendants rested their defense mainly upon the order of Gen. Tucker. That brings up for consideration the extent of his powers as a military officer.

When war is flagrant, in the territory of its operations, the civil law, in many of its mandates and over some subjects, retires and gives place to martial law, or the laws of war, and many things may be lawfully done which would be grossly wrong and oppressive in time of peace, which are, nevertheless, permitted and sanctioned by military law. In *Mrs. Alexander's Cotton case*, 2 Wal., 418, it was said by the chief justice that private property, under the modern usages of war, is not subject to seizure for the sake of gain, and ought to be restricted to special cases dictated by the operations of the war; in that case "cotton" was excepted out of the operations of the rule. See also 1 Kent's Com., 98. If a belligerent takes from its own citizens property for military uses, it is under a plain duty to make compensation. The right of seizure by an enemy (in modern times) has been limited to contraband of war; and things actually necessary for the operations of the war, and effects, perhaps, in a place carried by storm. In the early case of *Respublica v. Sparhawk*, 1 Dall. Penn. Rep., 388, it was held to be legitimate to remove private property necessary to the maintenance of an army or useful to the enemy, and in danger of falling into his hands, and if captured at the place they were deposited, the government would not be responsible for the consequent loss. In that case, the government did not appropriate the goods, but they still continued private property. If such authority may be exerted, in case of emergency, the property might be destroyed to save it from the enemy.



---

Opinion of the court.

---

Where property of a citizen may be taken possession of or destroyed to prevent its falling into the hands of the enemy, the government is under a duty to make compensation. *Mitchell v. Harmony*, 18 How., 134. Nor would the officers or those acting under orders, be trespassers. *Ibid.* In the same case, the court say: it is impossible to define the particular circumstances of danger or necessity in which the power may be exercised. Each case must depend on its own circumstances. The principle was carried to its full limit in *Ford v. Surget*, 46 Miss. Rep., 150. It were, perhaps, well to bear in mind in judicial reviews of acts that occurred at such times, that it is very difficult to fully comprehend the situation of the country and state of facts as they presented themselves at the time to those engaged in the transactions.

A fundamental principle of the common law was, that the owner could not be deprived of his property, except according to the law of the land. Judge Story (3 Com. on Const.), says, that *magna charta* did not, on this subject, confer a new right, but was only declaratory of the common law.

The law exacts accountability from those who do violence either to the person or property under claim of authority, and considers of the rightfulness and extent of the authority, in determining as to the sufficiency of the excuse and justification.

Numerous instances have occurred in the British courts, of suits brought against the governors of colonies, and others in civil and military authority abroad, for alleged wrongs done to individuals and their property, and in every case, they were put to their justification, and if the act complained of was done without lawful authority, recoveries were had. Lord Bellamont's case, 2 Salk., 625; *Wey v. Jally*, 6 Mod. R., 195. Other cases were mentioned by Lord Mansfield in *Mostyn v. Fabrigas*, 1 Cowp., 174, 5, 6. One was the suit of a carpenter against Sabine, who was governor of Gibraltar, for approving the sentence of a court martial, under which the plaintiff had been flogged. Not being amenable to

---

Opinion of the court.

---

martial law, the defendant was a trespasser. Another was a case of trespass against Capt. Gambier, of the Royal Navy, who, under orders of Admiral Boscawen, stationed off the coast of Nova Scotia, pulled down some shanties in which the sutlers sold liquor to the sailors, which injured their health and efficiency. Yet this action was sustained in England, although it was urged that it was "local." The judges would not entertain the objection, because there would be no remedy in Nova Scotia.

If the power exercised by a military officer is conferred by law, trusting to his discretion for a proper use of it, then, although he acts unwisely, he is not a trespasser, nor are those who obey his orders. But if he justifies the act done under an order, which for its rightfulness rests alone on "necessity," the onus is upon the defendant to show the existence of such necessity. 13 How., S. C., *supra*.

A case in analogy to this is *Jones v. City of Richmond*, 18 Gratt., 522-3-4. The evening preceding the evacuation of Richmond by the confederate forces, the city council passed an ordinance directing the destruction of all the spirituous liquors, on the premises where found, and appointed a committee of citizens to carry the ordinance into execution. The last section pledged the faith of the city to compensate the owners the value of the liquors. The motive was to prevent the riot, tumult, and disorder of a drunken soldiery, which might endanger citizens and their property.

The court of appeals held the city liable. In upholding the validity of the ordinance, the court refer to the constitutional provision forbidding the taking of private property for public use, without making compensation, and treat the destruction of the liquor as a devotion of private property to the public good, as within the equity of the constitutional provision, and as also authorized by the police powers, conferred upon the city government. The court say the modes were open to the city "to destroy the liquor, and leave the question of liability to be litigated, and

---

Opinion of the court.

---

determined by the courts; or, secondly, to contract to pay the value. Had the council pursued the first mode, it would have been responsible in trespass."

It is distinctly held that if the city had not contracted to pay, it would have been liable in trespass.

The City of Richmond v. Smith, 15 Wallace, 432, arose out of the same condition of facts. In the circuit court of the United States, the city justified on these allegations, that the confederate government had determined, on the evacuation of the city by its forces, to burn certain warehouses; that said warehouses were set fire to and destroyed by order as aforesaid, and the house in which was the plaintiff's liquor was contiguous thereto, and was about to take fire, at the instant the committee were destroying the liquor, and was actually consumed. And so the liquor would have been lost by the fire, if the committee had not destroyed it.

The supreme court hold the plea to be no bar to the action, for the reason "that impending dangers give no immunity to one man to destroy the property of another."

In Mayor etc., of New York v. Lord, 18 Wend., 129, 130, the suit was to recover from the city the value of a building and its contents (merchandise), destroyed in order to arrest the spread of the conflagration. "It was laid down by the chancellor delivering the opinion of the court for the correction of errors, as a well-settled principle at common law, that in case of *actual* necessity, to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army or any other great calamity, private property may be taken, used or destroyed for the relief, protection or safety of the many. Those for whose benefit the loss was incurred ought, in natural justice to make compensation, but the actors are not trespassers.

In some instances the law has conformed to this principle of natural equity, and administers practical justice. Maritime contributions, to apportion individual losses, rest upon that founda-

---

Opinion of the court.

---

tion. The ship, and freight and cargo contribute to indemnify the owner whose goods have been the subject of a jettison to save the ship and cargo from an impending peril.

The provision in the American constitution, "that private property shall not be taken for public use without compensation," has its origin in the same principle. Such, also, is the basis of the statutes of several of the states, charging the city treasury the value of houses torn down to arrest the progress of a conflagration. But in those instances where the plea of "necessity" prevails as a justification, the doers of the act complained of as injurious are not liable as trespassers. The injured parties have no redress at law, but may have strong claims on the municipal or public treasury. *Parham v. Justices*, 9 Georgia, 349.

Private property is sacred from the violent interference of others, and whoever takes, injures or destroys it, is a trespasser unless he shows a justification. Necessity — extreme, imperative and overwhelming — may constitute such justification; but expediency or utility will not answer.

Justification under a plea of necessity is always a question of fact to be tried by a jury, unless the law-making department has provided some other mode. *Hale v. Lawrence*, 1 Zab., 730; *Mitchell v. Harmony*, 13 How. S. C., 115, *supra*. If "necessity" be appealed to as excuse or justification, it must be shown to have sprung out of the circumstances that are alleged to have invoked it.

Let us test the instructions to the jury, by the principles we have been discussing.

The first charge, granted at the prayer of the defendants, declares, in effect, that a military officer in command of a district has power to deal with private property, and may, if in his judgment it is fit and proper, order it to be destroyed, and that those who obey are protected by the order. The jury are informed that, if Joshua Green was the captain of a militia company, subject to the commands of General Tucker, commandant of a district including the city of Jackson, and that Green and his asso-

---

Opinion of the court.

---

ciates, by authority of an order from General Tucker, did destroy the whisky, then they must find for defendants.

Such a doctrine is subversive of all civil rights, and places the civil authorities in absolute subordination to the military. In Colonel Mitchell's case, 13 How., *supra*, the seizure of the goods, resulting in their ulterior loss, was made in the enemy's country. Yet he was held to be a tortfeasor, because the goods were not at the time exposed to capture by the Mexican army, and were not taken to be used in his own military operations. It was put upon Mitchell to show the one state of facts or the other, in justification.

If it was not referred to an officer commanding military operations to judge finally and conclusively of the necessity of the seizure of the property of a citizen, lawfully with his property at that place, with less reason can it be claimed that General Tucker, who was commanding in this state, could, at his discretion, destroy the property of a citizen; and with the more force does the argument press upon him to show his right.

The instruction rests upon the pretension, so emphatically repudiated by the supreme court in Milligan's case, 4 Wallace, 124, viz: "That in time of war, the commander of an armed force (if in his opinion exigencies demand it, and of which he is to judge) has the power, within his district, to suspend all civil rights, and subject citizens as well as soldiers, to the rule of his will." And if that position be true, "then, in time of war, foreign or domestic, each district commander, may, on the plea of *necessity*, substitute military force for and to the exclusion of the laws."

In defining where "martial rule may rightfully obtain, it is limited to the theatre of active military operations, where no civil authority remains, and there is a necessity to furnish a substitute to preserve the safety of the army and society; and martial rule can only prevail until the laws can have their free course."

When the plaintiff's whisky was destroyed, active hostilities had ceased; all the confederate armies, east of the Mississippi

---

Opinion of the court.

---

river, had surrendered, and the whisky was not exposed to capture, nor could it have been necessary to Gen. Tucker's military uses. But more than this, martial law did not prevail, nor did there exist that state of things in which it could rightfully exist.

But the authorities, to which we have referred, distinctly announce the doctrine, that in flagrant war, power does not belong to a military officer, merely as such, to take or to destroy the property of the citizen, unless a necessity exists to apply it to military purposes, or to prevent its capture by the enemy.

But in this case, the war, so far as actual military hostile movements were concerned, had ceased by an actual surrender of the confederate armies east of the Mississippi river, before the act complained of was committed.

The authorities teach the further doctrine, that military orders do not protect and justify an invasion of private property, either in war or in time of peace, if done without the warrant of the law, applicable to the one state or the other.

The circumstance that Gen. Tucker was district commander, with headquarters at Jackson, did not to any degree supersede the civil authorities, whether state or municipal, within the scope of his command. His duties were purely military, without right to interfere with private citizens or their property, except within the just limits we have attempted to define.

The first instruction for the defendants is erroneous; the second, which embodies the idea, applied to the condition of facts therein recited, is also erroneous.

Since this case must be remanded for a third trial, we have thought it proper to consider carefully the ground of defense exclusively relied upon on the last trial, and also to examine somewhat the other matters of defense set up in the notice. This, perhaps, was unnecessary, since the defendants did not offer evidence that they were acting under the authority of the city council.

Judgment reversed, and cause remanded.

## Syllabus.

## H. G. D. BROWN et al. v. BOARD OF LEVEE COMMISSIONERS.

1. "DUE COURSE OF LAW" — DUE PROCESS OF LAW — LAW OF THE LAND. — These terms do not mean the general body of the law, common and statute, as it was at the time the constitution took effect. For that would deny the right to the legislature to amend or repeal the law. They refer to certain fundamental rights, which that system of jurisprudence of which ours is a derivative has always recognized.
2. PRACTICE — JURISDICTION. — It is essential to the validity of a judgment or decree that the court should have jurisdiction.
3. SAME — JUDGMENT SUITS IN REM. — The "thing" must be subject to the cognizance of the court and amenable to its decree.
4. JUDGMENT SUITS IN PERSONAM. — The right to adjudicate, so as to conclude the defendant, is conferred by notice actual or constructive, according to a prescribed formula.
5. POWER OF THE LEGISLATURE OVER PROCESS. — The provision of the bill of rights "that no person shall be deprived of life, liberty or property, except by due process of law," inhibits the legislature from dispensing with personal service, where it is practicable, and has been usual under the general law. It does not take from the legislature power to amend the law and change the formula of remedies; provided, the fundamental right of personal notice, actual or constructive, in personal suits, is not taken away.
6. SAME — CASE IN JUDGMENT. — The statute authorizing the suit, prescribing the mode of procedure, and the decree of sale, are condemned as unconstitutional, because it dispenses with personal notice, when the defendants, or many of them, were residents of the county and state and amenable to such process; because the legislature attempted to change a suit, which, according to the "law of the land," was *personal* into a proceeding *in rem* so as to dispense with personal notice; because the defendants had or may have had diverse and independent interests in the land, conflicting with each other and the complainants, and were so numerous that it would be impracticable to unite them in one suit, and adjudicate the numerous collateral controversies that might arise; because the statute and suits under it are unusual, extraordinary and without precedent, legislative or judicial, in the history of the state.

APPEAL from the Chancery Court of Bolivar County. Hon. E. STAFFORD, Chancellor.

---

Statement of the case.

---

The record shows that on the 22d of October, 1872, the board of levee commissioners of the counties of Bolivar, Washington and Issaquena filed their bill in chancery court of Bolivar county, against "All persons having or claiming any interest, either legal or equitable, in and to the lands herein described," as defendants, without naming any individual.

The bill alleges that said board was incorporated by an act passed November 27, 1865, for the purpose of rebuilding old levees or making new ones in said counties, and that by said act a uniform tax of ten cents per acre was levied and assessed upon all the lands in said counties (with certain exceptions), payable on or before the 1st of March in every year, from 1867 to 1879 inclusive, which tax was made a lien on said lands, and that in case of failure to pay the same, it was provided that the sheriff should, on the first Monday of April of each year, sell the land in default, at the court house, for cash, and if the amount due on any tract should not be bid, then the same should be struck off to the levee treasurer of the said board, to whom and his successors in office, a deed should be executed; the sales to be continued from day to day until completed.

That *in accordance with said act*, from year to year, certain lands in the county of Bolivar have been so struck off and sold to said treasurer of said board; that a large portion thereof are still held by said treasurer, as *part of the assets of complainants*; and that the tax due said board on said land, as well as state, county and liquidating levee tax, at the date of sale, and which have accrued since, are still due and unpaid. Complainants file lists of said lands, showing amount of tax due *up to the 1st day January term, 1873, of this court*, and the gross amount at said last named date, as Exhibits A, B, C, D, E and F.

Complainants file this bill under an act entitled "An act for relief of the board of levee commissioners of the counties of Bolivar, Washington and Issaquena, and for other purposes," approved April 5, 1872, and pray a decree for sale of said lands,



---

Statement of the case.

---

or such parts thereof against the sale of which no good cause is shown, for the amount of taxes stated to be due thereon, and for general relief.

The exhibits embrace a large proportion of all the land in the county, but only so much is copied as bears on this case.

Exhibit C contains the land claimed by appellant, H. G. D. Brown, to wit: All of section 13, and the S. W. 1-4 and the W. 1-2, and S. E. 1-4 of S. E. 1-4 of section 14, township 24, range 6 W., containing 916 acres, and states that the same is claimed by said board as struck off to their treasurer at the tax sale in 1869, for the levee tax of ten cents per acre for the year 1868, and it gives a statement of the levee, state, county, and all other taxes due on said land for the years 1868-9-70-71 and 1872, making an aggregate of \$943.12.

No affidavit was made, nor any order of publication, but the record shows that a notice was published in the "*Pilot*," a newspaper published in the city of Jackson, twelve times, commencing October 26, 1872, and ending 18th January, 1873. This notice is entitled in a cause of

"*Board of Levee Commissioners, etc., v. All persons, etc.*—Boliver County Chancery Court, October Term, 1872."

This notice states the filing of the bill or "petition" praying for the sale of the land contained in said lists for the taxes stated, and requires all persons having or claiming any interest to appear at the next succeeding term, and show cause why the prayer of the petition should not be granted, or to redeem said lands.

The lists were appended to this notice.

At January term 1873, on the 24th day of the month, without any *pro confesso*, without proof, and without a reference, to ascertain the amount due, a final decree was made, reciting the proof of publication, and that no cause had been shown why the lands should not be sold for the amount of taxes stated; and much land in the county was ordered to be sold by a commissioner on the first day of the next regular term of the court.

---

Brief for appellants.

---

From this decree H. G. D. Brown, who claims a portion of the land, brings this appeal.

The following errors are assigned :

1. The whole proceeding was null and void so far as appellant is concerned, because he was not made a party to the proceeding, and had no notice thereof, nor opportunity given to be heard in his defense.

2. There was no order of court made requiring the appearance of the defendants, or directing any publication to be made against them.

3. No decree *pro confesso* was taken or entered against the defendants, and the decree was given without any proof whatever, and without any reference to a commissioner or master to ascertain the amount due.

4. The bill claims, and the decree is given for taxes not due when the bill was filed, to wit: for all taxes due on and up to the first day of the January term, 1873, of the court, the bill having been filed in October, 1872.

5. The bill shows that the land had once been sold in pursuance of law for the taxes sought to be recovered in this suit, and purchased by said board of levee commissioners, whereby all lien or claim for said taxes had been extinguished, and no suit could be maintained to subject the same land to a second sale for the same tax.

6. The decree does not direct the land to be sold in tracts not exceeding one hundred and sixty acres.

*H. T. Ellett and Harris & George*, for appellants, contended :

1. That a judgment or decree rendered without notice is void. *Campbell v. Brown*, 6 How., 114; *ex parte Heyfron*, 7 How., 127; *Gwin v. McCarroll*, 1 S. & M., 351, 358; *Jack v. Thompson*, 41 Miss., 49. The constitution of the United States and this state provide that "no person shall be deprived \* \* \* of property, except by *due process of law*." This expression, "due course or process of law," imports a trial,

## Brief for appellants.

according to the course of the common law, after due notice to the party to be affected and a fair opportunity given to make defense. Sedg. Stat and Const. Law, 537, 610. 4 Hill (N. Y.), 146; 1 Cowen, 740; 3 Hen. & Mun., 336, 16 Penn., 256; Murray v. Hoboken Co., 18 How., 276; 1 Kent's Com., 620; 3 Story on Cons., 661, § 1783; 2 Smith's Lead. Cases, 683. The defendant must have had due notice to appear, and be subject to the jurisdiction of the court. Bissell v. Briggs, 9 Mass., 462; Buchanan v. Rucker, 9 East, 192. The act of April 5, 1872, p. 217, under which the present proceeding was had, is in flagrant violation of these constitutional restrictions. It not only authorizes proceedings against men without making them parties, but absolutely prohibits any person, though a citizen of the state and resident in the county, being made a party by *name, designation or description*, thus rendering it impossible for any man to find out whether he is interested in the proceeding. The legislature may, to a certain extent, substitute *constructive notice*, instead of actual. Jack v. Thompson, 41 Miss., 50; Zecharie v. Bowers, 1 S. & M., 584; 3 S. & M., 641; 6 S. & M., 375; 28 Miss., 354; Foster v. Simmons, 40 Miss., 585. A judgment at law, taken by default on a constructive service of process, the defendant will be entitled to relief in equity by a new trial at law, if he has a legal defense to even a part of the demand. Jones v. Commercial Bank, 5 How., 43, 539; Lapece v. Hughes, 24 Miss., 69; So. Ex. Co. v. Craft, 43 Miss., 508. And a final decree in chancery will be set aside under the same circumstances. McGowan v. James 12 S. & M., 445. A judgment, against a party not named in any part of the record, is void. It cannot be presumed that *one who does not appear* to have been a party, has had his day in court. Freeman on Judgments, p. 115, § 141; Herman on Estoppel, p. 115, §§ 53, 111-146; Cooley Cons. Lim., 404; Nations v. Johnson, 24 How., 202. A personal judgment rendered on publication alone is not evidence of personal liability outside of the state where rendered. Board of Public Works v. Columbia College

---

Brief for appellee.

---

(S. C. of U. S.) Central L. J., Feb. 5, 1874; D'Arcy v. Ketchum, 11 How., 165; Moulin v. Ins. Company, 4 Zab., 222.

2. The decree of the chancery court is void, because the statute requires notice to be published in the ———, a public newspaper printed in the city of Jackson. It was intended to designate the particular paper, and the act fails to do so. A substantial and necessary part of the act is wanting, and it cannot be supplied by intendment or proof. It is a clear case of patent ambiguity and cannot be helped by averment. 2 Conn., 537; 11 Conn., 132; 1 Starkie Ev., 589; 1 Greenl. Ev., § 297.

3. The proceeding is not a proceeding *in rem*. Jurisdiction of cases in *rem* depends on the seizure and custody of the *res*, which seizure and custody are held to be constructive notice to all parties interested. Stewart v. Board of Police, 25 Miss., 482; N. O., J. and G. N. R. R. v. Hemphill, 35 Miss., 24; Mankin v. Chandler, 2 Brocken, 127; Cooper v. Reynolds, 10 Wall., 317; Ridley v. Ridley, 24 Miss., 648.

W. L. Nugent, for appellee, filed an elaborate argument, in which, after explaining the reasons, policy and necessity of the law complained of, he made the following points:

1. To justify the prosecution of the appeal, the appellant must have been prejudiced by the decree, and he could only be prejudiced if he were the owner of, or interested in some of the lands decreed to be sold. The proceedings being by publication against "all parties interested," generally, to justify this court in entertaining the appeal, there must appear in the record a *prima facie* showing of ownership or interest. The mere suggestion by counsel, in a petition for appeal, not signed or sworn to by the appellant, shows nothing, for if this were not the case, any person, whether owner or not, could have the proceedings reviewed. In Tate v. Carnes, MSS. opinion, this court held that a merely nominal defendant in a chancery proceeding, who was not shown to be prejudiced by the record, could not prosecute an appeal. Hamilton v. Moore, 32 Miss., 205; Hewett v. Cobb, 40 Miss., 61; Miller v. Mayfield, 37 Miss., 688.

---

Brief for appellee.

---

2. The question is, can the legislature provide for collecting taxes which operate by law as a specific charge and lien upon lands, in a summary mode and by publication alone. It is a maxim of the law and a rule laid down in all the text books, that in all judicial or *quasi* judicial proceedings affecting the right of the citizen, he shall have *notice* and *an opportunity of a hearing* before the rendition of any judgment, order or decree against him; and that when a statute authorizes a judicial proceeding and is *silent as to notice*, the adjudication will be void unless notice is given to the party in interest. When, however, the proceedings are *in rem* instead of *in personum*, the court acquires jurisdiction by seizing the thing without specially noticing the interested parties. In cases within this class, notice to all concerned, *as a rule*, is required to be given by publication. The reason for a different rule at common law is, that suits proceed against the *persons* whose interests are sought to be affected. *Jack v. Thompson*, 41 Miss., 49. And unless this personal service be given, there can be no judgment obligating the person. *Black v. Black*, 4 Bradf. Sur. Rep., 205. The right of the legislature to prescribe notice by publication, and to give it effect as process, rests upon the *necessity* of the case, and has been long recognized and acted upon. In the matter of *Empire City Bank*, 18 N. Y., 200, Denio, J., said: "When the legislature has provided a kind of notice by which it is reasonably probable that the party proceeded against will be apprized of what is going on against him, and an opportunity is afforded him to defend, I am of opinion that the courts have not the power to pronounce the proceedings illegal." See also *Rockwell v. Nearing*, 35 N. Y., 314; *Nations v. Johnson*, 24 How., U. S., 195; *Beard v. Beard*, 21 Ind., 321; *Mason v. Messenger*, 17 Iowa, 261. While it is true that in such cases no personal judgment can be rendered, still, the publication of notice will enable the court to give effect to the proceeding so far as it is one *in rem*; and that is the only thing attempted in the case. *Cooley Const. Lim.*, 404. The right of the legislature to provide notice by pub-

---

Brief for appellee.

---

lication, in certain cases, has been universally conceded when the necessity of the case authorizes it. *Todd v. Kerr*, 42 Barb., 317; *Maguire v. Maguire*, 7 Dana, 181; *Thompson v. State*, 28 Ala., 12; *Harrison v. Harrison*, 19 Ala., 499; *Mansfield v. McIntyre*, 10 Ohio, 28; *Hubbell v. Hubbell*, 3 Wis., 662; *Griffith v. Vestner*, 5 How., 736; *Foster v. Simmons*, 40 Miss., 585; *Ingersoll v. Ingersoll*, 42 Miss., 155. In *Griffith v. Verner*, Sharkey, C. J., said: "It is altogether competent for the law to prescribe any mode of bringing parties into court. It may be done by process direct or by notice. Publication is constructive notice to all persons interested, and when such mode of giving notice is prescribed by law, all parties are presumed to be duly notified." In fact, it has been decided that "when a statute provides for the taking of a certain security, and authorizes judgment to be rendered upon it on motion, without process, the party entering into the security must be understood to assent to the condition, and to waive process and consent to judgment." *Lewis v. Garrett's adm'r*, 5 How., 434; *People v. Van Epps*, 4 Wend., 390; *Pratt v. Donovan*, 10 Wis., 378; *Murray v. Hoboken Land Co.*, 18 How., 272; *Philadelphia v. Commonwealth*, 52 Penn. St., 451. How much more strongly would the rule apply in a proceeding to utilize for revenue purposes, large bodies of lands which had been sold for arrearages of taxes, and the titles to which had passed absolutely by *due course of law* to the state or the levee boards.

3. "It has never been questioned," says Redfield, C. J., in *Thorpe v. Rutland and Burlington Railroad Co.*, 27 Vermont, 142, "that the American legislatures have the same unlimited power in regard to legislation which resides in the British parliament, except where they are restrained by written constitutions." As a general rule, every state has complete control over the remedies which it offers to suitors in its courts. It may give a new and additional remedy for a right already in existence, \* \* \* and any rule or regulation in regard to the remedy, which does not, under pretense of modifying or regulating it, take away or im-

---

Opinion of the court.

---

pair the right itself, cannot be regarded as beyond the province of the legislature. Cooley Cons. Lim., 361, 362. The act in question does not relate to any ordinary suit in court, and is out of the operation of ordinary adjudication. If the view urged by counsel for the appellant be adopted, the result will be that no revenue can ever be collected except by a direct proceeding and upon service of process, when the debtor resides in the state; and it would be difficult to sustain even a sale under execution predicated of a notice by publication. The law now controverted was passed to remedy a great public inconvenience, and to solve the conflict of claims growing out of sundry tax sales to different claimants, by treating all arrearages of taxes according to the express terms of the statute, as liens upon the lands, and by selling them, after opportunity offered the original owner to redeem — an opportunity before then lost by efflux of time. To accomplish this necessary end, a fair and summary remedy was provided, giving ample opportunity for defense to all parties in interest, and requiring a list of the *lands proceeded against*, and the amount of taxes claimed to be published for twelve consecutive weeks to the world. I cannot discover that any provision of the constitution was invaded; and testing this case by the rule that the party interested shall have notice and an opportunity to defend, the record shows that the appellant appeared in ample time to avail himself of the remedy prescribed by the law itself. Certainly he was notified in fact as well as by construction of law. The remedy provided by the legislature was exactly adapted to the exigency, and there is nothing limiting the power of the legislature in this respect to be found in the constitution.

SIMRALL, J., delivered the opinion of the court:

These were suits in chancery brought by the board of levee commissioners, under the provisions of an act of the legislature, passed the — day of —, 1872. In each case the complain-

---

Opinion of the court.

---

ant makes substantially the same allegations. In 1865, the complainant was created a body corporate "for the purpose of rebuilding, strengthening or elevating the old levees in the counties of Bolivar, Washington and Essaquena, and by the terms of the act an annual tax was imposed upon all the lands in those counties until 1879, for that object, which was a lien upon the land. To enforce collection, the collector was authorized on the second Monday in April, to sell the lands of delinquents, for cash, and on the failure of other persons to bid the amount due, then the lands should be struck off to the treasurer of the board. That from year to year, a large number of sales were made to the treasurer; many of which lands are still held as the property of the board.

Filed as exhibit to the bills is a schedule of lands bought in by the treasurer for the taxes of 1869, with a statement of the levee, state and county and all other taxes for the years 1869, 1870, 1871, 1872.

The prayer is that the court will decree a sale of the lands "or such parts and parcels thereof against the sale of which no good cause is shown, for the amount of taxes stated to be due thereon," and if mistaken in this, for other, further and general relief, etc.

The suits were brought under a special statute, which it becomes necessary to analyze, before proceeding to consider the questions of law, presented for solution.

The preamble discloses that the lands claimed to be held and owned by the levee commissioners are beclouded by claims thereto by the state, and the liquidating board of levee commissioners, and as it is important that the titles held by the board of levee commissioners should be quieted, so that the lands may be made available in the payments of the debts contracted by the board for levee purposes. Therefore, as we might well suppose, the enactments which follow, would point out a mode by which these lands should be disincumbered, and relieved of the "claims" named in the preamble, to wit., the "state" and the "liquidating board." But the first section which gives the mode of procedure discovers a much larger scope.



---

Opinion of the court.

---

It is thereby made the duty of the board of levee commissioners to file in the chancery court \* \* \* their petition "against all persons claiming or having any interest either legal or equitable in and to said lands," praying that said lands be sold for the payment of all taxes in arrears thereon," etc. "Nor shall the state, or any person or corporation interested therein, be made defendants by name, designation or description."

The notice of the suit is prescribed in the second section. "The board of levee commissioners shall cause notice to be published in the ———, a public newspaper published at Jackson," directed to "all parties or persons having any interest either legal or equitable in and to said lands, to appear \* \* \* and show cause why said lands should not be sold for taxes, in arrear \* \* or to redeem the same." The notice shall be accompanied by a list of the lands filed with the petition.

The enactment extends the remedy beyond the recital of the preamble, so as to make it reach all persons, natural or artificial, who have claim to or "interest in the lands."

The sale shall be made "for the taxes in arrear and unpaid," and not only the "state," and "liquidating board," but all persons or corporations interested in the lands are to be notified by newspaper publication to come in and show cause, etc.

It is insisted by the plaintiffs in error, that the decrees of sale founded upon the petitions and exhibits and notice, are invalid, because it is an effort to deprive them of property "without due process of law," and that the remedy pursued is not according to "due course of law." Sec. 2, art. 1 Const. of Miss., and sec. 28. The original of the grand principle embraced in the second section of 1st art. of the constitution is in Magna Charta, and was designed primarily to shield persons and their property from the invasions of the prerogative and arbitrary power of the king. The Great Charter, and, subsequently, the American Constitution, declare the fundamental principle of the absolute inviolability of life, liberty and property against the encroachments of arbitrary

---

Opinion of the court.

---

power, and forbid the deprivation of either, by any form of power or authority, except it be, as in Magna Charta," *per legale iudicium parium suorum, vel per legem terræ*," or, as written in some of the constitutions, "by the law of the land, or the judgment of his peers;" and in others, "due process of law," and "due course of law," and "according to the law of the land." See a collection of the various state constitutions in Sedgwick on Stat. & Const. Law, 535-7. Whichever form of expression has been used, they all have the same general interpretation.

Mr. Webster gave an exposition of the meaning of the words, law of the land and due process of law, in his argument in the Dartmouth College case, reported in 4 Wheat., which has received the sanction of the courts. "By the law of the land, is most clearly intended the general law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. It means that every citizen shall hold his life, liberty and property under the protection of general rules which govern society." *Taylor v. Porter*, 4 Hill (N. Y.), 140; *Griffin v. Dogan & Martin*, 48 Miss., 21.

These terms, "law of the land," "due course of law," "due process of law," do not mean the general body of law, "common and statute," as it was at the time the constitution took effect. For that would seem to deny to the legislature the power to alter, change or amend the law. Yet we know that it is every day's practice for the law-making department of the government to repeal old laws, enact new, and change remedies.

The principle does not demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue.

It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded, in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by "due course of law."

---

Opinion of the court.

---

Some subjects are cognizable in one court, and others in another. What would be "due process of law" in one proceeding, might not be in another. The nature of the suit or action, and how the judgment will operate, and upon what, must be looked at in determining whether the proceeding has been conducted according to due process of law. In our system, there have existed remedies, which affect the person, suits *inter partes*. Remedies which are of a mixed nature, touching both the person, and a "thing," and remedies which are purely and simply "*in rem*," which affect, or may affect, the subject matter or thing only. These several remedies are not necessarily peculiar to particular courts, as those which pursue the common law; those which are of equity jurisdiction, or admiralty courts. It is fundamental to all judicial proceedings, no matter what the constitution of the court, and its forms of administering justice.

It is essential to the validity of the judgment of every court, that it should have jurisdiction over the subject. And in addition, where the action or suit is personal, over the defendant to be charged thereby.

In personal suits, that which gives the court cognizance over the defendant, is notice of the suit in some prescribed form.

In proceedings *in rem*, the "thing" or "matter" affected by the decree, must be subject to the dominion of the court; its *situs* must be such as that the judgment may be operative upon it. In the strict technical suit, the thing, in some appointed mode, is placed in the power of the court, generally by a seizure and possession by an officer of the court. As a vessel captured from an enemy on the high seas, or for violating a blockade, or seized for violating the navigation and impost laws; or liquor or tobacco taken into possession by the marshal, because held or offered for sale in contravention of the internal revenue laws. In these and such like cases, the judicial process goes against the "thing," which is in the custody of the court, through its officer, and which is technically the defendant. *Mankin v. Chandler & Co.*, 2 Brocken

---

Opinion of the court.

---

Rep., 127-8; Freeman on Judgments, § 611. In these cases parties interested in the "thing," were warned in by proclamation and published notice, to prefer their claims.

There are other suits of the nature of proceedings *in rem*, such as the probate of wills, grant of administration, condemnation of private lands for public highways, etc. Freeman on Judgments, from § 606 to § 614; 2 Starkie Evi., 22 to 230, and Stewart v. Board Police Hinds County, 25 Miss., 480, 481-2-3. In these instances, the judgment operates upon the *situs* and relations of the subject matter, and by force of the judgment, impresses a new relation, as in the last case cited. The relation of the land to the private owner is changed, and a new relation, that of dedication to the public use is impressed upon it. 2 Smith's Lead Cases, 660.

Persons are not made parties by name to these suits, and when they come into the litigation it is as intervenors.

Nor is it essential to the jurisdiction that the owner or any person having interest in the "thing" to be affected by the judgment, should have notice, other than such as is implied in the seizure itself. Every person is concluded by the judgment; because it is open to the world to intervene and assert rights. The judgment binds everybody—there is no such thing as personal parties, who with their privies are estopped and concluded, and nobody else, as in personal suits. Stewart v. Board Police, 25 Miss., 480; N. O., J. & G. N. R. R. Co. v. Hemphill, 35 Miss., 23.

Although the legislature may, at its pleasure, provide new remedies, the power is nevertheless subject to the condition that it cannot, by a new formula, overthrow ancient and fundamental rights which have been respected and observed in judicial procedures. It is fundamental that to be bound and concluded by a judgment in personal suits, the defendants must have the notice prescribed, actual or constructive, and to give validity and conclusive effect to a judgment in proceeding *in "rem,"* the thing must be subject to the control of the court and within its territorial jurisdiction. It would be a violation of constitutional injunc-

---

Opinion of the court.

---

tion, if the legislature should dispense with notice in personal actions or suits, or with territorial as well as judicial dominion over the "thing," in suits *in rem*.

Jack v. Thompson, 41 Miss. R., 50, is an example of the former class. The legislature had conferred authority on the probate courts to bind out a certain class of persons, as apprentices, but made no provision for notice to them. The court declared that "the principle is universal, that no order or decree is valid or binding upon a party who has had no notice of such a proceeding against him." And further, "that it is not in the power of the legislature, under the constitution, to dispense with notice, actual or constructive."

The cases cited from 25 and 31 Miss. R., afford examples of the latter class. Whilst "processes" are in the power of the legislature, it must respect that ancient and fundamental right which has always belonged to parties sought to be charged in their persons and property, that they shall have notice of the suit. Courts of common law and equity cognizance have always exacted personal notice, if practicable; that is, if the defendant was commorant within the territorial jurisdiction, and if he could be found. But in order to prevent a failure of justice "*ex necessitate*," if personal notice could not be given, an inferior mode, such as in the wisdom of the legislature might be thought likely to impart actual notice, has been allowed — such as leaving a copy of the summons with a member of defendant's family, or affixing it to the door of his domicile, and in certain cases by publication in a newspaper.

The several common law modes of compelling the appearance of the defendant in court were: 1. The summons. 2. The writ of distringas, or distress infinite. 3. The *capias ad respondendum*, and finally, proclamation and outlawry. The obdurate defendant was subject to a distress of his goods, and the issues of his land, until exhausted, and then to the arrest of his person. 2 Black. Com., 3 Book, pp. 279, 280.

---

Opinion of the court.

---

The relaxation which has been allowed, and the extent of it, has to substitute an inferior mode of giving notice which would be apt to accomplish that result, and that in cases of necessity, to avoid a failure of justice. It is just that property in this state should be held liable to a creditor, notwithstanding the absence or nonresidence of the debtor. It would not violate the due process of law to seize that property, by judicial process, and hold it amenable, to the absconding or nonresident debtor; to that extent it is a proceeding "*in rem*," but in this case, the statute has always required some mode of publication most apt to give notice to the debtor. But if the debtor is not served or does not appear and personally submit to the jurisdiction of the court, a personal judgment would be void. *Holman v. Fisher*, executor, 49 Miss. Rep. To illustrate, the principle upon which constructive notice rests and the extent of it, reference is made to *matter of City Bank*, 18 N. Y., 215; *Happy v. Mosher et al.*, 48 N. Y., 317; *Harris v. Hardeman*, 14 How. S. C., 339; *Nations v. Johnson*, 24 How. S. C., 102; *Voorhies v. Bank of U. S.*, 10 Peters, 449; *Mason v. Messinger & May*, 17 Iowa, 266; *Beard v. Beard*, 21 Ind., 322.

Are these judicial proceedings obnoxious to the objection that proper notice has not been given and in other features are they unusual and extraordinary?

The bill seeks a sale of all the lands held by the board of levee commissioners, and bought in for taxes; as well as for the taxes accrued since 1869. If the object were simply to make a sale, the board had ample power to do that, under the act of November 27, 1865, sec. 15, pp. 60, 61, pamphlet. Nor was the suit necessary to cut off the equity of redemption, for that had expired before the suit was brought, as to all persons, except those under disability. Nor again was the suit brought to confirm and establish the title of the board of levee commissioners, to the lands bought at the tax sales. \* \* \* The policy of the statute of 1872 seems to be, that, inasmuch as the board of levee commissioners may have a doubtful title to the lands conflicting with purchasers, made at

---

Opinion of the court.

---

sales for state and county taxes, and also the liquidating commissioners, and also with the claims of original owners. Therefore one bill shall be filed covering all the land in the county, by means whereof a judicial sale shall be had unless opposing claimants shall come in and pay what taxes were due, when the lands were bought by the board, and subsequent taxes. And the legal effect of such decree and sale shall be to conclude all claimants and titles and rest a complete right in fee in the purchasers. In such a suit a vast number of parties are involved, whose claims originate from several sources, each independent in right, and have nothing in common with each other.

Suppose that the board of levee commissioners claims title to 500 parcels of land in the county, to which there are that number of separate conflicting claims, some derived from purchases for state and county taxes, others from the liquidating board or commissioners, and others by the original owners, what a multitude of ramified and intricate questions arise as to who "shall redeem," and in showing cause why a sale should not be made. Each claimant to every separate parcel must deraign and set forth his own separate right, either to redeem or to show cause why his parcel should not be sold. The statute manifestly intends that there shall be, or may be, as many separate and independent litigations as there may be separate tracts held under different rights.

In the history of the "due course of law," can any precedent be found of a suit, intended in so peremptory and speedy a manner to conclude so many parties and so many and such various rights?

One has been cited for the plaintiffs in error quite analogous to this (*Webster v. Reid*, 11 How., S. C., 459), which was characterised by the court as "extraordinary." An act was passed by the territorial legislature of Iowa with a view to settle claims to lands owned by the half breed Indians in Lee county, partition them or make sale for the benefit of the claimants. *Brigham*,

---

Opinion of the court.

---

Wilson and Young were appointed commissioners to carry out the object, who were to receive six dollars per day for their services. Judgments were obtained by two of the commissioners for their services, and under these judgments the entire tract of the half breeds was sold. Suit was brought under a special statute, requiring notice by 'publication in a newspaper with no other "designation" of the defendants, than "owners of the half breed lands in Lee county." Held, that the judgments under which the lands were sold were void. The reason assigned is, that the defendants did not have notice. In the case at bar, the notice was addressed to "all persons claiming interest in the lands." The parties interested may be as numerous as in the case cited, but with this distinguishing difference, that their interests were in severalty, under separate titles, without a single element of even tenancy in common. Whereas it appears that the "half breed Indians" were cotenants. We must look at the nature of the suit and the character of the contests that may spring up under it. This proceeding brings within its range a possible controversy with every claimant, and in each separate controversy, no other persons are interested except the one or more asserting right to the specific parcels.

The course of judicial process, as heretofore established in our laws, was where the subject was local, but the necessary defendants could not be reached by ordinary process, to give notice by publication to the absent and nonresident, addressed to them by name. . There is an exceptional case or two dispensing with naming the defendants, in proceedings against the unknown heirs of a decedent, where the plaintiff does not know and cannot ascertain their names.

But there is no instance in our legal history where a judicial process has been allowed in personal suits, dispensing with notice, actual or constructive, addressed to the parties by name, to be charged thereby, where it could be readily ascertained who they were. As we have seen, the practice has been so uniform and



---

Opinion of the court.

---

ancient, that the defendants must be named, if known, and that they must have personal notice by due service, or a constructive notice by some means, which the legislature has prescribed, as calculated to come home to the party, that a departure from it in a special case would be obnoxious to the objection that it was not according "to due process of law." It is manifest that many, if not most of the persons claiming these lands are nonresidents of the state and of the respective counties where the suits were brought. It is also evident that the names of many, if not most of those were known, or could have been known to the levee commissioners. Yet the law directed that they should not be made defendants by name or other description. The statute was framed on the idea that, because the act of 1865 impressed upon the land a lien for the taxes, that it was competent to give a remedy in the nature of a suit *in rem*. The lien was given to make the demands of the levee board paramount to all incumbrances which the tax payers could impose or suffer on their property. But if the suits were merely dependent for support on the liens, it did not thereby become a "proceeding *in rem*" any more than would detinue, replevin or foreclosure suits of mortgages or other liens. 2 Brocken, *supra*.

It is *ultra vires* of the legislature to break down the essential and fundamental distinctions and differences which have always existed in the nature of judicial processes. In those trials affecting life, liberty or property, where, according to the system of law transmitted to us, the jury has been the triers of the fact, the constitution assures that mode of trial by declaring "the right of trial by jury shall remain inviolate." If, in the judicial history which has borne upon its current a body of jurisprudence to us, it has ever been the "right" of the people, in personal suits, to be notified, in some appointed formula, of the proceedings against them, so that they may have opportunity to appear and make defense, then that right is guaranteed by putting a restraint upon organized power, not to deprive of life, liberty or property except by "due course or due process of law."

---

Opinion of the court.

---

Our jurisprudence has always regarded suits to recover chattels or to foreclose a mortgage, as personal suits, entitling the defendants to personal notice. If the legislature should enact that, hereafter, they shall be proceedings *in rem*, and that the seizure of the horse, or other effects, or of the mortgaged premises, shall confer jurisdiction and operate as constructive notice, it would be too plain for argument that the legislature was without power to thus uproot and turn aside the "due course of law." The motions to dismiss the appeals, and the reasons advanced in their support, illustrate the anomaly of the proceeding, viz: that the appellants were not named as parties, and the record did not show that either of them claimed and had interest in the lands; and there was no mode declared by which they could show their interest and obtain the appellate review of this court. What is alleged of them is true of every other having claim or interest.

Property is older than governments and constitutions. The right to life, liberty and property, was not conferred by society. The highest obligation of government is to defend and protect persons in their enjoyment. From the earliest ages of the law, these natural rights have been hedged around with certain immunities and privileges which experience has shown to be necessary for their security and defense. For centuries the inviolability of person and property, against unusual and extraordinary invasions of power, has been the birthright of British subjects. From their *magna charta*, the principle has been transcribed into the American constitutions.

It is the distinguishing and beneficent characteristic of the jurisprudence to which it belongs. That great doctrine, with the trial by jury, has largely aided to develop a strong and vigorous civilization and free governments, chiefly because these natural rights are placed beyond the reach of executive, legislative power, exerted in an extraordinary and unusual manner, that the Anglo-Saxon race have shown such reverence and devotion to the common law, and have consecrated in this country beneficent principles in constitutional guarantees.

---

Opinion of the court.

---

We think that the special statute under which the suit was brought is in contravention of the constitution, because,

It proposes to bind and conclude the interests of persons in private property without designating them by name as defendants, without a good or any sufficient reason for such departure from the general law.

Because it expressly denies personal service of process upon the defendants, when it is evident that many, perhaps most of them are residents of the county and state, and amenable to such process.

Because, in a personal suit, it directs notice by publication, without designating the names of the defendants, when many, if not most of them, by the general law, were entitled to personal service of notice, and when that form of publication directed is only allowable, and in instances where the complainant does not know, and has not the means of finding out the names of parties.

Because it allows judgment against a very large, but indefinite number of persons, who have, or may have, conflicting interests as against each other, as well as the plaintiffs, whose rights may be different in origin and extent, so that it would be impossible, according to the established modes of procedure under the general law, to bring such a multitude of persons before the court; or to investigate, determine and adjust in one decree, the number of independent litigations that might arise. That being impracticable, if not impossible, in the due course of the law, it is not competent to accomplish it by the extraordinary mode authorized by this statute.

Because the statute and the proceedings under it are unusual, extraordinary, and not calculated to afford a full investigation, and proper determination of any separate controversy that might arise, but likely to result in wrong and injustice to many individuals.

Because the proceeding authorized is extraordinary and unusual, without precedent in the legislative and judicial history of this state.

Because it has the seeming of giving judicial sanction, and

---

Syllabus.

---

thereby conclusiveness, to a decree for the sale and transfer of property, when the legislature itself was incompetent to direct the sale to be made, and when, according to the law of the land, the chancery court could not take cognizance and adjudge in the circumstances named in the act.

We are of opinion, therefore, that the decrees of the respective chancery courts are *coram non judice*, and of no validity, and are reversed.

---

## J. M. PHILLIPS et al. v. JACK HARVEY.

1. ATTACHMENT-- RETURN THEREON -- ITS OFFICE. — An officer levying a writ of attachment is required by § 1436 of the Code of 1871, to make a full return thereon of all his proceedings. It cannot be presumed that he levied on any other property than that specified in the return of the writ.
2. SAME— JUDGMENT AGAINST SURETIES. — It is error to render judgment against the sureties on a replevin bond for the whole amount of the plaintiff's demand, they being liable only for the assessed value of the property, when the jury have omitted to assess the value of the property attached and replevied. *Richard v. Mooney*, 39 Miss., 357.
3. SAME— SAME— CASE IN JUDGMENT. — The sheriff having returned the writ of attachment as levied upon a certain note: *Held*, that although the plaintiffs in error might have become sureties upon a bond purporting to be a replevin bond for the release of certain mules, plows, etc., claimed to have been attached, yet as the sheriff's return did not show any levy upon such personal property, and the jury not having assessed the value of the property, it was error to render a judgment against them.

ERROR to the Circuit Court of Tunica County. Hon. E. S. FISHER, Judge.

The facts of the case sufficiently appear in the opinion of the court.

The following errors are assigned :

1. The court below erred in rendering judgment against the sureties on the replevin bond, because no property had, in point

---

Opinion of the court.

---

of fact, been attached, as is shown by the sheriff's return on the writ of attachment.

2. Because there was no verdict of the jury fixing the value of the property attached, or supposed to have been attached, and consequently no judgment could be entered against the sureties on the replevin bond.

*H. H. Chalmers*, for plaintiffs in error, contended:

1. That as no property was levied on, as shown by the return of the writ, the bond in the record purporting to be a replevin bond is a nullity.

2. That even if the bond was good, no judgment could be rendered against the plaintiffs in error, because in their verdict they did not assess the value of the property, and plaintiffs in error were mere sureties on the bond.

PEYTON, C. J., delivered the opinion of the court.

It appears from the record in this case, that on the 2d day of January, 1872, Jack Harvey sued out an attachment against the estate of W. C. Deloach, a nonresident of this state, founded on a claim of three hundred and three dollars, which was returnable to the circuit of Tunica county, and was levied according to the return of the sheriff, on a debt due said Deloach by David Mack, to the amount of three hundred dollars, and said Mack was summoned to appear at said circuit court and answer as garnishee.

On the 2d day of February, 1872, the said defendant, Deloach, made an informal bond with the plaintiffs in error, as his sureties therein, purporting to replevy 2 mules, 8 plows, 4 sets of gear and 4 hoes, alleged to have been levied on as the property of said Deloach, by virtue of said writ of attachment, in the hands of said David Mack. The said bond was payable to the plaintiff in the attachment, and conditioned to pay such judgment as may be awarded against said Deloach on a trial of said cause.

Such proceedings were then had as resulted in a verdict for the plaintiff in attachment for the sum of three hundred and fifty-

---

Opinion of the court.

---

eight dollars, whereupon a judgment was rendered on said bond against the plaintiffs in error as sureties therein, in favor of the defendant in error, for the amount of said verdict.

The plaintiffs in error make the following assignments of error.

1. Because no property had, in point of fact, been attached, as shown by the sheriff's return on the writ of attachment.
2. Because there was no verdict of the jury fixing the value of the property attached, or supposed to have been attached, and consequently no judgment could be entered against the sureties on the replevin bond.

The statute provides, in section 1439 of the Code of 1871, that the defendant in attachment, at any time before final judgment, may replevy the personal property seized and taken into possession by the officer serving the attachment, by giving to such officer a bond with sufficient security to be approved by him, payable to the plaintiff, in double the value of such property, conditioned to have said property forthcoming to answer and abide the judgment of the court in said suit, or in default thereof to pay and satisfy the judgment to the extent of the value of said property; and on the execution of such bond, the said officer shall restore to the defendant the property so replevied, and shall return the bond so taken with the said writ of attachment and all the proceedings thereon. And as section 1436 of said code requires that the officer serving an attachment shall make a full return thereon of all his proceedings on or before the return day of the writ, we cannot presume that he levied on any other property than that specified in the return of the writ. It is the property seized by virtue of the attachment that may be replevied, and resort must be had to the return on the attachment to ascertain what that property is, and upon reference to the officer's return upon the attachment, no such property appears to have been seized under the attachment as that attempted to be replevied in this case. The bond, after reciting the personal chattels levied on as the property of the defendant in the attachment proceeds to state that

---

Syllabus.

---

it is to replevy this property that the bond is given. This negatives the idea that the bond was given under section 1440 to pay and satisfy the judgment, and in discharge of the attachment. If, as we believe, the bond was taken under the section first above mentioned it should have been conditioned to have the property forthcoming to answer and abide the judgment, or in default thereof, to pay the judgment to the extent of the value of the property, and as the value of the property was not ascertained, the judgment cannot be sustained under this section of the statute. And if the bond was taken under the succeeding section, it was unauthorized for the want of a levy on the property recited in the bond. By giving the bond under this section to pay and satisfy the judgment, the statute says the attachment shall be discharged, and the property attached shall be released and restored to the defendant. If the property was not taken under the attachment, it cannot be released and restored to the defendant.

The plaintiffs in error are sureties, and if the bond be a replevin bond, they are liable only for the assessed value of the property, and it will hence be error to enter judgment against them for the whole amount of the plaintiff's demand, when the jury have omitted to assess the value of the property attached and replevied. *Richard v. Mooney*, 10 George, 357.

Under neither of the sections of the code above mentioned, can this judgment be sustained, for the reasons given in the foregoing opinion.

The judgment must, therefore, be reversed.

---

HENRY BEDELL v. THE STATE OF MISSISSIPPI.

1. CRIMINAL LAW — PARTY MAY BE CONVICTED OF AN INFERIOR CONSTITUTION OFFENSE. — The Rev. Code of 1871, § 2809, provides that a defendant in a criminal prosecution may be convicted of any offense necessa-

---

Brief for plaintiff.

---

riously included in the offense charged in the indictment; *held*, that under an indictment for an assault with intent to kill and murder, the accused may be convicted of a common assault.

2. SAME — UNNECESSARY DESCRIPTIVE WORDS IN A VERDICT WILL NOT VIOLATE IT — CASE IN JUDGMENT. — The accused was indicted for an assault with intent to kill and murder, the jury found the accused not guilty as charged in the indictment, but guilty of "assault in an attempt to commit manslaughter:" *held*, that the verdict is good as a finding as to the "assault," leaving off, as surplusage, the descriptive words "in an attempt to commit manslaughter," hence the finding, under the law, was for a misdemeanor only, and accused should have been so punished.

ERROR to the Circuit Court of Colfax County. Hon. J. A. ORR, Judge.

The plaintiff in error was indicted for an assault and battery with intent to kill one William Steel, at the August term, 1873, of the circuit court of Colfax county; at the August term, 1874, he was tried, and the jury returned a verdict as follows: "Guilty of assault in an attempt to commit manslaughter," and the court sentenced him to two years' imprisonment in the penitentiary. A motion was made for a new trial, which was, by the court overruled, and the case came to this court on a writ of error.

*White & Bradshaw*, for plaintiff in error.

1. The defendant was convicted of a misdemeanor only, and not a felony, and in support of this view we cite *Gibson v. The State*, 9 George, Miss. 310-11-12.

We contend, however, that in the case at bar there was no conviction at all, for if the jury intended to convict defendant of an assault, they could only do so after they had returned a verdict of *not guilty* of an assault and battery with intent to kill and murder as charged, for every assault and battery with intent to kill, includes an assault, but before the jury can return a verdict of guilty of an assault, they must return a verdict of not guilty as charged with intent to kill and murder.

In *Gibson's* case *supra*, the court saw the necessity of this kind of verdict, and had it corrected by the jury. If, however, the court



---

Brief for state.

---

should think that defendant was convicted of a felony, and not a misdemeanor, then we contend that he was convicted of an entirely different offense from the one charged against him, and for which he was tried. Rev. Code, 1871, § 2497, p. 552.

The section above referred to, defines two distinct offenses; one "assault with intent to kill," and the other, "assault in the attempt to commit manslaughter," and the lesser is not included in the greater; the gist of one is the intent, and the other is the act; that is, the attempt, the last, may be punished without the specific intent, which is necessary in the former.

2. We further submit that § 2497, *supra*, is not constitutional in this, that it does not give the defendant the right of a jury trial. See sec. 7, art. 1 of the constitution of Mississippi. It leaves the discretion with the judge to say whether a certain act is a felony or a misdemeanor. The jury may convict the defendant of a misdemeanor, and the judge may sentence him for a felony; this is a trap that may catch the defendant or the jury, which the constitution intended to guard against.

*G. E. Harris*, attorney general, for the state.

The plaintiff in error was indicted for "assault with intent to kill," and was convicted for "assault in an attempt to commit manslaughter," and sentenced to two years' imprisonment as for a felony.

The case of *Gibson v. The State*, 88 Miss., 310, is referred to by counsel for the defendant. The case of *Gibson* was under the Code of 1857, p. 575, he was indicted for the same offense, and the verdict was the same as in the case at bar; but the difference is that there is quite a difference in the statute of 1857 and that of 1871; at the time *Gibson's* case was tried, the court doubted if there was such an offense known to the statutes of this state, and so the court held that the finding of the jury was good for a mere assault. That trial took place in 1859, and under the Code of 1857. The legislature on the 2d of February, 1860, passed an act creating the offense *malum prohibitum*. Acts of 1860, p. 284. This act

---

Opinion of the court.

---

was carried into the Revised Code of 1871. See sec. 2497. It will be observed that Gibson's case rests upon a different statute, and is no precedent for this case. On an indictment for any offense, the jury may find the defendant guilty of an inferior offense, necessarily included in the offense charged. Rev. Code, 1857, p. 622; Rev. Code, 1871, § 2809.

A party indicted for murder may be convicted of manslaughter, because the latter is necessarily included in the former. This being true, it seems to me to be also true, that a party indicted for an "assault with intent to kill and murder," may be convicted, under our statute, of an "assault in the attempt to commit manslaughter." Is not the latter necessarily included in the former. I am at a loss to see any distinction in the two cases. In the last case here stated, the accused cannot commit the former offense without doing and being guilty of every thing necessary to constitute the latter offense; if this be true, it is necessarily included. As in the case of robbery, a party cannot be guilty of robbery without doing everything necessary to complete the crime of larceny; then the latter is necessarily included. The instructions asked by plaintiff in error were too broad and general. See Riggs' case, 4 Cushman, p. 51; John's case, 24 Miss., 569.

SIMRALL, J., delivered the opinion of the court.

The indictment charges an assault with intent to kill and murder. The jury found the defendant guilty of an assault in attempt to commit manslaughter. If the latter offense is included in the former, the conviction is right. In *Brantley v. the State* (1850), 13 S. & M., 470, the first count was "with intent to murder" (as in this case); the second count was for an assault and battery. The verdict was guilty on the second count, and the question was, what, if any, sentence could be pronounced. The conviction was sustained under the statute providing that when the offense charged consists of different degrees, the jury may find a verdict of guilty of an inferior degree of such offense. It was said the

---

Opinion of the court.

---

jury might under the first count, have found a verdict of not guilty of assault and battery with intent to murder, but guilty of an assault and battery.

In the construction of this statute, it has been held that the specific intent charged, must be proved. As if it be to "murder A.", proof of intent to murder "B." will not do, for here the intent charged is not supported by the proof. *Jones v. State*, 11 S. & M., 317; *Morgan v. State*, 13 S. & M., 243-4-5; *Barcus v. State*, 49 Miss., 18. The very point under discussion was decided in *Morman v. State*, 24 Miss., 55-6-7, under statutes very similar to those now in force. The indictment charged an assault \* \* with intent to murder; the verdict was guilty of assault with intent to commit manslaughter. The 33d section of the Penitentiary code, Hut. Code, 960, defined the crime of assault with intent to kill, very much as the present statute, and prescribed the punishment, not to exceed ten years' confinement in the penitentiary. The 36 art. Hut. Code, 961, provided that any person who shall be convicted of an assault with intent to commit \* \* manslaughter, shall be punished by imprisonment in the penitentiary not exceeding five years. The court determined that the latter crime was not a lesser offense or an offense of lesser degree than the former, because the *intent* is an essential ingredient in both offenses, and must be proved as laid in the indictment. The rule is that "the intent with which the act was done must be proved to be the same with that charged." Thus under 43 George, 3d c. 35, the intent in several counts was to murder, to disable, to do some grievous bodily harm; the jury found the intent to be to prevent being apprehended; this was held bad. 1 Chit. Crim. L., 233. So it was ruled in *Morman v. State*, *supra*, that a verdict of guilty of an assault with intent to commit manslaughter, was an acquittal of the offense, charged in the indictment, and a conviction of a different and distinct offense, which was not allowed either under the statute or at the common law.

Under art. 305, p. 622, Code of 1867, the same in Code of 1871,

---

Opinion of the court.

---

p. 2809, the jury may convict of an inferior offense, or other offense which is necessarily included in the offense charged in the indictment. In Gipson's case, 38 Miss., 310, the indictment and verdict were precisely as in this case. And the only point made was as to the character of judgment that could be pronounced. The court held the verdict to be in legal effect guilty of "assault," and treated the words, "with intent to commit manslaughter," as merely descriptive of the assault; proceeding on the idea that this was an "inferior offense, or other offense included in the offense charged in the indictment," for which under the above statute the defendant might be convicted.

It would follow, that the first assignment of error is well taken, upon the verdict the defendant was only guilty of a misdemeanor, and ought not have been sentenced to imprisonment in the penitentiary.

There is nothing in this record from which we can determine, whether there was error or not in refusing the motion for a new trial. No bill of exceptions was taken to that decision of the court. There was also a motion in arrest of judgment, but no decision appears to have been had upon it. Among the grounds set forth in the motion, was that the defendant had been convicted of a misdemeanor but had been sentenced for a felony.

The court erred, as we have seen, in construing the verdict as finding the defendant guilty of a felony and imposing the punishment of imprisonment in the penitentiary. The verdict was good, as guilty of the assault.

The only error committed by the circuit court, was in construing the verdict, as finding the defendant guilty of a felony, and thereupon imposing the punishment of confinement in the penitentiary. The verdict, as we have seen, was good as a finding of guilty of the "assault."

The judgment will be reversed, but the verdict will stand, and cause will be remanded to the circuit court, to pronounce the appropriate judgment upon it.

---

Brief for plaintiff.

---

## J. MARX v. W. C. TRUSSELL.

1. PRACTICE—SET OFF—APPEAL FROM JUSTICE'S COURT.—T. brought his suit against M. in the justice's court, and obtained a judgment. M. took an appeal to the circuit court. In that court M. obtained leave of the court, and filed a set-off, for the first time, on the motion of counsel; the court refused to permit him to offer any proof in support of his set-off because no set-off was filed in the justice's court; *held*, that the circuit court ruled correctly. Rev. Code §§ 1805, 1806, 1834.

ERROR to the Circuit Court of Lauderdale County. Hon. ROBERT LEACHMAN, Judge.

This was an appeal from a justice's court to the circuit court of Lauderdale county, and there tried at the May term 1872, of said court. Judgment was rendered in the justice's court against plaintiff in error, Marx, and he took his appeal, and in the circuit he obtained leave to file his set-off, which he filed on the 24th of May, 1872, and on the 29th of May the case came on to be tried, and after the plaintiff in the court below had introduced his testimony and rested his case, the defendant, Marx, was offered as a witness to prove his set-off; opposing counsel objected, because the set-off had not been filed in the justice's court, and the circuit court sustained the objection, and refused to allow any testimony in support of the set-off. The jury rendered a verdict for the plaintiff below; a motion was made for a new trial which was by the court overruled.

And the case comes to this court upon a writ of error.

*Ramsey & Shannon*, for plaintiff in error:

The only question in this case is the correctness of the ruling of the circuit court, deciding that the court had no power to allow a set off filed in an appeal case, unless it was filed in the justice's court.

We think there can be no doubt as to the power of the court to such an amendment, whether a set off had been filed in the justice's court or not. Rev. Code, § 621.

---

Opinion of the court.

---

*Roberts & Grace*, for defendant in error:

"Appeals to the circuit court shall be tried anew in a summary way," etc. Rev. Code 1871, § 1334.

The defendant is required to file his set off on or before the return day of the summons. Rev. Code 1871, § 1306; *Vaughan v. Robertson*, 22 Ala., 523-5; *Smith v. Fleming*, 9 ib., 768.

TARBELL, J., delivered the opinion of the court.

This cause originated before a justice of the peace. The action was on open account. There was a judgment for the plaintiff in the action, and the defendant appealed to the circuit court. The same result followed in the latter court, when the defendant in the action prosecuted a writ of error. The question for the decision of this court is, whether the defendant in the action, having failed or neglected to file with the justice of the peace a written statement of his set off against the demand of the plaintiff, was entitled to amend by filing it in the circuit court.

The Code, § 1305, directs the mode of bringing suit before a justice of the peace, and then follows § 1306, which provides that "the defendant in any such action shall, on or before the return day of the summons, and before the trial of the case, file with the justice of the peace, the evidence of debt, statement of account, or other written statement of the claim which he may desire to set off against the demand of the plaintiff, and in default thereof, he shall not be permitted to use it on the trial." It is understood from the record, that the defendant made no attempt to file or to give evidence of any set off before the magistrate, but wholly, and, inferentially, purposely omitted to file or present his counterclaim in that court. Nothing appears, otherwise; and the first time that a set off is referred to is in the circuit court, which court ruled that the statement could not then be filed, and rejected evidence offered in proof of the items of the account thus sought for the first time to be set up in the cause.

It is the opinion of this court, that the provisions of § 621 of

---

Syllabus.

---

the Code, relative to the amendment of pleadings and proceedings in the circuit court, do not apply to the case made in the record under examination. This view is strengthened by the language of § 1884, which provides that "appeals to the circuit court shall be tried anew, in a summary way, without pleadings in writing," evidently intending that the parties should be confined, on appeal, to the issues made before the magistrate. But this remark is not intended to deny to the circuit court power to amend issues made and set off filed in the justice's court. The Code, § 1806, is positive and prohibitory in its language and intent in the case stated therein.

A contrary rule might operate harshly, by throwing the costs of both courts upon the plaintiff in the action, and this might be the sole object of the defendant in neglecting to file a statement of his set off with the justice of the peace.

Judgment affirmed.

---

DICKMAN & HILL v. W. M. WILLIAMS.

1. PRACTICE — CIRCUIT COURT — ATTACHMENT. — When an attachment is levied on property, and a claim is set up by a third party, and the controversy is between the attaching creditor, and the claimant presents an issue, the plaintiff in the attachment holds the affirmative of the issue, and must show the concurrent circumstances, which would warrant a sale of the property for the payment of his debt. He must prove that the defendant in attachment owes the debt or some part thereof.
2. SAME — SHIPMENT — STOPPAGE IN TRANSITU. — B. shipped 8 bales of cotton to D. & H., of New Orleans, on account of Weisenger, by the steamer Magenta, to be sold by D. & H. on account of Weisinger. Whilst in *transitu*, the cotton was attached by W., and D. & H. made affidavit claiming the cotton, and presented an issue to try the rights of the respective parties. If goods are shipped by the order of the consignee and for his account, where the consignee sustains the relation of purchaser, the moment the goods are delivered to the carrier, they have passed from the seller and are the property of the vendee, as completely as if they had actually come to his possession, subject, however, to the right of stop-

---

Brief for plaintiffs.

---

page *in transitu*, if the purchaser has become insolvent. But where the goods are shipped without order, and on account of the shipper, he stands towards the consignee as principal, and the consignee sustains the relation of agent or factor, and the shipper continues the owner and may generally order and direct the disposition of the goods, or even reclaim them.

3. SAME — SAME — ADMISSIONS OF AN AGENT — CASE IN JUDGMENT. — The general rule is, that where the acts of an agent will bind the principal, admissions of the agent respecting the subject matter of the agency will also bind him, if made at the same time, and constituting a part of the *res gesta*. Such admissions are regarded as verbal acts and part of the *res gesta*, and may be proved without calling the agent himself. Declarations to be part of the *res gesta* must be made during the negotiations or progress of the business of the agency, and be of such a nature as to give character to the acts done.

ERROR to the Circuit Court of Warren County. Hon. GEO. F. BROWN, Judge.

The facts of the case are sufficiently set out in the opinion of the court.

The following are the assignments of error, to wit:

1. In overruling claimant's objection to, and admitting in evidence, the copy of the collector's permit.
2. In refusing claimant's second instruction.
3. In granting plaintiff's instruction, the fifth in the record.
4. In overruling claimant's motion for a new trial.
5. In overruling claimant's objection to the statement of Pharr. *M. Marshall*, for plaintiff in error.

The *onus probandi* was on the plaintiff in attachment to show that the property levied on was liable to his attachment. Rev. Code of 1857, pp. 381, 533. And to do this they must show by proper evidence, two things: 1. The right as against the defendant in attachment. 2. That the property levied on is subject to the right. *Mandel v. McClure*, 14 S. & M., 11. The only evidence adduced was the testimony of W. M. Williams (one of the plaintiffs in the attachment), supplemented by the copies of two instruments of writing, to wit: the bill of lading under which the



---

Brief for plaintiffs.

---

cotton was in transit when levied on, and the permit of the collector of U. S. internal revenue, for the removal of eight bales of cotton from the internal revenue district in which the cotton was produced and marked.

The testimony of said witness, leaving out of consideration the copies attempted to be proven by him, amounted to this: He sued out the attachment, pointed out the property, eight bales of cotton on steamer Magenta, shipped and en route for New Orleans, La., consigned to Dickman & Hill; that after the levy and before claimants prepared their papers, one Pharr, who made claimants's affidavit, had a conversation with witness in Vicksburg (claimants residing in New Orleans), in which conversation Pharr said that he wished to compromise or settle the matter without litigation or expense, and if witness would drop his attachment and let the cotton go to New Orleans to Dickman & Hill, that they would, *after the amount due* them by Weisenger for advances was satisfied, pay the plaintiff's (in attachment) claim against said Weisenger out of any balance to Weisenger's credit out of the proceeds of this cotton or any other hereafter sent. That Weisenger was indebted to Dickman & Hill, and this cotton was shipped them to pay that debt.

Applying this evidence to the law as laid down in the 1st, 3d and 4th instructions as to the burden of proof, and the effect of such consignment, the plaintiff clearly failed to make out his case, and the claimant was entitled to a verdict. A copy of the bill of lading was inadmissible, when the original could have been procured.

The court instructed the jury that "when the bill of lading contains the words 'for account of' a certain party, the article consigned is *prima facie*, the property of the party for whose account it is shipped, and not of the consignee." This was error, and if correct in the abstract, the court should not charge the jury upon abstract principles of law, not applicable to the case. *Myers v. Oglesby*, 6 How., 46; *Powell v. Mills*, 8 George, 691; *Jarnigan v. Fleming*, 43 Miss., 710; *Evans' Case*, 44 Miss., 762.

---

Brief for defendant.

---

The court, in charging a general principle of law, to which there are exceptions applicable to the evidence, should explain the exception. *Cohea v. Hunt*, 2 S. & M., 227; *Baker v. Kelley*, 41 Miss., 696; *Young v. Powell*, 41 Miss., 197. The plaintiff must show that he has a demand against the defendant, before he could show that the property levied was subject to that claim, this has been held in *Berry v. Anderson*, 2 How., 649; *Mandel v. McClure*, 14 S. & M., 11; *Whitehead v. Henderson*, 4 S. & M., 704; *Ford v. Hurd*, 4 S. & M., 683; *Maury v. Roberts*, 5 Cash., 225.

*W. B. Pittman*, for defendant in error:

The issue in the court below was one of fact, to wit, whether the cotton levied on was the property of the claimants Dickman & Hill, or to defendant in attachment, Weisenger, the jury found against the claimants, and the court below refused a new trial. This court will not inquire whether there was sufficient evidence to sustain the verdict, or whether the verdict was clearly right, but whether it was manifestly wrong. *Waul v. Kirkman*, 18 S. & M., 599; *Prewett v. Coopwood*, 1 George, 369. Williams proves that Pharr, the agent of claimants, admitted that the cotton belonged to defendant in the attachment, that it was shipped by him to plaintiff in error as his factor, to pay what he owed them, and offered, in the name of plaintiff in error, to hold any balance the cotton might bring over and above their debt; the record shows that Pharr was the agent, and his admission for them was binding on them, and it was properly admitted. The bill of lading, not objected to, shows that it was for account of Weisenger, and that the ownership was in him; this would sustain the verdict in the absence of all other proof to the contrary. Where a debtor, by bill of lading, consigns cotton to his factor for the payment of a debt, such consignment does not change the title to the property, and it is still liable to attachment by the shipper's creditor. *Bonner v. Marsh*, 10 S. & M., 376.

As to the first assignment, to wit: The admitting of the collector's pursuit. The record shows that the original was in the

---

Opinion of the court.

---

hands of the United States government, and could not be obtained; it was, therefore, proper to admit the secondary evidence.

The second assignment of error is, that the court erred in refusing to instruct the jury, that the plaintiff below must show a judgment against the defendant in the attachment in order to prevail in the claimant's issue. On this point, it is only necessary to cite the case of *Melins v. Houston*, 41 Miss., p 59. See also Rev. Code, 1857, art. 38, sec. 381.

The third assignment is, that the court erred in granting plaintiff's instruction, five, in the record. This instruction is admitted to be good law, but it is claimed to be an abstract principle of law, not applicable to the case, and likely to mislead the jury. The record shows, that the bill of lading in this case contains the very words used in the instruction, to wit: "for account of T. B. G. Weisenger," and was, therefore, an instruction in effect in law of a written contract offered in evidence.

In addition to this, even if the court had erred in giving such an instruction, this court would not reverse the judgment unless it could be shown, that such instruction was calculated to mislead the jury, which has not been shown in this case.

SIMRALL, J., delivered the opinion of the court.

This is a controversy between the attaching creditor and a claimant of the property.

It appears that the eight bales of cotton were on board the steamer *Magenta* at Vicksburg, to be transported to New Orleans, under a bill of lading, to be there delivered to the consignee, Dickman & Hill. The cotton was shipped by John W. Boyd, at Shell Mound Landing, on the steamer *Countess*, on account of T. B. G. Weisenger, with the privilege of reshipment, and under that stipulation was, at Vicksburg, transferred to the *Magenta*. The bill of lading was, without objection, put in evidence to the jury.

---

Opinion of the court.

---

The burden was upon the attaching creditor to show that the cotton was the property of his debtor, Weisenger, in such sense as made it liable for his debt. The only evidence in support of that proposition was the bill of lading and the statements of Pharr, the agent of the claimants, in making affidavit to their claim and executing bond for them (which statements were objected to by the plaintiffs, as incompetent testimony).

Diverse views have been advanced in argument, as to the effect of the bill of lading, as evidence of ownership. Most of the cases to be met with in the books, range themselves into one or the other of two classes. First, a shipment of goods by the consignee, by his order, and for his account, where the consignee sustains to the consignor the relation of purchaser. The moment the goods are delivered to the carrier, they have passed from the seller, and are the property of the vendee, as completely as if they had actually come to his possession, subject, however, to a right of stoppage in transition, if the purchaser has become insolvent. Such are the cases of *Stokes v. La Rivere*, 3 T. Rep., 466; *Hodgson v. Loy*, 7 T. Rep., 440.

The other class is a shipment of goods without order, and upon account of the shipper, where the shipper stands towards the consignee as principal, and the consignee sustains the character of agent or factor.

In these circumstances, the shipper continues the owner, and the consignee is his agent and subject, generally, to his orders as to the disposition of the property. The shipper may at any time reclaim the goods before they have been actually sold. If the factor be a creditor of the shipper, he does not acquire a lien upon the goods, or any specific right, until they have actually come to his possession. *Walter et al. v. Ross et al.*, 2 Wash. Cir. Court Rep., 288; *Bonner et al. v. Marsh et al.*, 10 S. & M., 381-3; 2 Kent's Com., 499.

In the case before the court, the cotton, when attached, was *in transitu* to New Orleans, consigned to Dickman & Hill, for sale for

---

Opinion of the court.

---

account of Weisenger. It does not appear that they had ordered the cotton, were owners, or had any interest in it. The bill of lading imports a right in Weisenger to control the cotton or its proceeds. If the testimony of Pharr, the agent, was competent, he gives a complexion to the case precisely analagous to that of *Bonner v. Marsh*, 10 S. & M., *supra*. There the cotton was on board a boat at Natchez (when attached), consigned to Bonner & Co., who were factors, and to whom the shipper was indebted, yet it was held that the shipment for the purpose of liquidating the debt, did not give a right of property to the factors.

But were not the statements of the agent competent, the exception taken being that such agency was not shown as authorized Pharr to speak for his principal?

The general rule is, that where the acts of the agent will bind the principal, admissions respecting the subject matter will also bind him if made at the same time, and constituting part of the *res gestæ*. 1 Greenl. Ev., § 113; Story's Agency, § 134 to § 137. Such admissions are regarded as verbal acts, and part of the *res gestæ*, and may be proved without calling the agent himself. *Ib*; 1 Greenl. Ev., § 114.

Williams, in his testimony, states "that at the time Dickman & Hill claimed the property, but before they had made out the papers, Pharr, who made the affidavit, had the conversation with the witness" (the said Dickman & Hill residing and being in New Orleans \* \* ).

Declarations, to constitute a part of the *res gestæ*, must be made during the negotiation or progress of the business of the agency, and be of such nature as to give character to the acts done. *Fogg v. Child*, 13 Barb., 251; *Dorne v. Southwork Man. Co.*, 11 Cush., 205. Here the declarations of Pharr were made about the claim of Dickman & Hill to the cotton, and while he was taking measures to assert it, and come within the rule we have laid down.

But the objection specifically made to their competency was, that proof had not been offered of any appointment or authority

---

Opinion of the court.

---

to act. On that point it is sufficient that Dickman & Hill have adopted his acts by litigating the claim in this suit, which he made on their behalf, and, *pro hac vice*, he is their agent, and they are bound by his admissions in conducting the business, as verbal acts. It is proper, therefore, to have admitted this testimony to the jury. It tended to show that Weisenger was forwarding this cotton to his factors for sale, to liquidate advances made by them to him, and to hold the balance subject to his control. This gave them no right of property in the cotton before it actually came to their possession, and left it subject to the plaintiff's attachment. It is in all respects like the case cited in 10 S. & M., *supra*.

The only remaining question is whether it was incumbent on the plaintiff to show a judgment against Weisenger. The court declined, at the instance of the claimants, so to instruct the jury.

And in so doing, followed the decision in *Sherwood v. Houston*, 41 Miss. Rep., 61, 62, in which it was held that the claimant was not bound to wait until judgment is rendered against the original defendant. Because, as said by the court, "his claim of property presents a matter of individual right in him independent of the indebtedness of the defendant to the plaintiff in attachment."

Is that so? The statute places the plaintiff in attachment in precisely the same attitude towards the claimant, as if he were plaintiff in detinue, and the claimant were defendant thereto. In that action the plaintiff must show his right of property and possession, and the defendant would succeed by showing a good outstanding title in a stranger quite as well as proving such title in himself.

In the claimant's issue the plaintiff in attachment holds the affirmative of the issue, and must show the concurrence of circumstances which would warrant a sale of the property to pay his debt, and the claimant may remain passive and rest in security until the plaintiff has made affirmative proof. Manifestly one fact he must prove is that the defendant in attachment owes the

---

Opinion of the court.

---

debt or some part of it. Suppose the claimant should offer testimony, to prove that the debt had been paid by the debtor, and claim therefore, that the plaintiff had no right to proceed against the property; that it would seem in some stage of the litigation must be open to inquiry. The real inquiry between the plaintiff and claimant is, whether or not the property is liable to pay the debt of defendant in the attachment. And if the creditor fails to show indebtedness, he comes short of showing any right to meddle with the property. Such, in numerous cases, have been the views of our predecessors, not merely that the indebtedness must be established, but that it must be manifested by a judgment. In *Tiffany & Co. v. Johnson & Robinson*, 27 Miss., 227, it is said: "It was error to render a final judgment against the claimant before the plaintiff's claim was fixed against his debtor by a judgment against him. The right to recover depended on two things. First, the establishment of the debt against the original defendant, which was the very foundation of his claim; second, that the property was subject to the satisfaction of the demand as the property of defendant. The first step is the most important, and is indispensable, otherwise the creditor might perfect his judgment and enforce it by execution against the claimant, without any establishment of his demand, and when indeed he might have no legal demand against the original debtor." This reasoning is cogent and very satisfactory to our minds. In the earlier case of *Mandel v. McLure*, 14 S. & M., 12, the same conclusion was reached upon the same line of reasoning. The chief justice declared: "The right to recover of the claimant must rest upon an established liability of the defendant in attachment." "The attachment itself does not give a right to sell the property. A judgment is necessary to give effect to the attachment lien."

The condition of the claimant is much like that of a garnishee, and it has been settled as to him that there must be judgment against defendant in attachment. *Berry v. Anderson*, 2 How., 649; *Whitehead v. Henderson*, 4 S. & M., 704; *Ford v. Hurd*, ib., 688.

---

Opinion of the court.

---

The propriety of a judgment against the original defendant, may be made manifest by illustrations. Suppose that A. has executed a mortgage embracing chattels to B., who does not immediately put it upon record. C., a creditor of A., levies an attachment on the goods before the registration of the mortgage. Suppose further that the mortgagee has personal knowledge that the debt of the attaching creditor has been satisfied, manifestly upon the trial of the claimant's issue between the attaching creditor and mortgagee, the latter ought to be allowed to show that the debt has been paid. If that be so, then upon the trial of such issue (if before the creditor has recovered judgment against his debtor), the plaintiff would be required to prove the indebtedness of the original defendant to him; and the claimant could contest the debt upon all the grounds, such as payment, failure of consideration, etc., which might be set up by the debtor. That would include in the trial of the claimant's issue, and that could be litigated in the attachment suit by creditor and debtor. This shows the propriety of the rules laid down in all the earlier cases. That there shall be an ascertainment of the indebtedness and the amount by judgment, so that on the claimant's issue, the range of inquiry shall be limited to the liability of the property to be sold to pay the established debt. For if the rule laid down in 41 Miss. be adhered to, there can be no escape from the necessity of trying, on the claimant's issue, the question of debt or no debt, with all the defenses thereto, as well as the liability of the property to pay it. The statute does not intend that both suits shall be tried in one issue. But assumes that the creditor has contested with his debtor, as to the debt, and obtained judgment, and provides the claimant's issue, to determine the liability of the property for it. If the court, in *Sherwood v. Houston*, 41 Miss., had considered the antecedent cases, and overruled them, we should cheerfully have followed that decision; but there is no reference to them. We are inclined to think that had the preceding cases been brought to the notice of the court, it would have conformed its judgment to them.



---

Syllabus.

---

There is no evidence in this record that the plaintiffs in attachment had established their debt against Weisenger, and the statement of the law to the jury on that point was erroneous.

For these reasons the judgment of the circuit court is reversed, and remanded, and a *venire facias* awarded.

---

### H. M. JONES v. W. DE B. HOOPER.

1. CHANCERY PRACTICE—WRIT OF ASSISTANCE.—The object of the writ of assistance, is to put a party who has purchased real estate at judicial sales, into possession of the premises. The most familiar instance of its use is where land has been sold under a decree foreclosing a mortgage, but it applies to any other sale enforcing a lien, whereby the title and right of the property would pass to a purchaser, and where the party in possession was a party to the suit, or came into possession under him *pendente lite*. Where a court of equity has authority to dispose of the fee, as to all parties to the decree, it ought also to control the possession, in order to administer complete and efficient relief. The power of the court would be inadequate to full redress, if the suitor, after procuring a decree of sale, and investing the purchaser with title, must resort to a court of law, to obtain the possession.
2. SAME—SAME—PETITION FOR WRIT.—To entitle a party to the writ of assistance, the petition should show, the sale under the decree, the purchase, the deed by the commissioner, payment of the money, if the sale was made for cash. That the deed was exhibited to the defendant, and possession demanded. The defendant should have reasonable notice of the application for the writ.

APPEAL from the Chancery Court of Monroe County. Hon. O. H. WHITFIELD, Chancellor.

Appellant as executrix of N. B. Jones, deceased, filed her petition, making Asa B. Daniel, Mary Daniel, and others, heirs of her testator, defendants thereto, asking for a sale of real estate under the provisions of her testator's will. She renounced her right to sell, and all joined in asking that E. H. Bristow be appointed commissioner to sell the land. The sale was made. W. de B.

---

Brief for appellant.

---

Hooper, appellee, became the purchaser. The sale was reported to the April term, 1874, of the chancery court and confirmed by the court. At the same term, Hooper, presented his petition and motion to said court, exhibiting his deed to the land from E. H. Bristow, the commissioner, and showing that W. M. Jones, appellee, Asa B. Daniel, and Mary Daniel, all of whom were parties to the original proceeding for the sale of the land, and therefore precluded by the decree of sale, withheld the possession from him, and asking for a writ of possession. The petition was granted, and a writ of assistance or possession was granted, and the case comes to this court upon appeal.

The following is assigned for error, to wit :

"The court below erred in granting the writ of assistance upon the motion of appellee."

*Darret & McFarland*, for appellant:

The record shows that the chancery court decree the sale of a house and lot in the city of Aberdeen to pay the debts of Nelson B. Jones, deceased ; that a commissioner appointed by the court for that purpose sold the house and lots in controversy, to Wm. de B. Hooper appellee who was a stranger to the record. That after the sale was made, report thereof was made to the chancery court and confirmed.

After that had been done, appellee made a motion on the docket of the court asking for a writ of assistance, which motion was sustained and the writ issued. This we say was error. The rule of law in our state is that a purchaser of land at a commissioner's sale under a decree of the chancery court, who is not a party to the original suit in which the decree of sale was made, cannot obtain in his own name a writ of *assistance* to turn parties out of possession of the purchased premises. 13 S. & M., 131 ; 39 Miss., 508. In this case Hooper was not a party to the record.

Again, the course to get the writ in a proper case, is to give the party in possession a copy of the writ, and if it is not obeyed, then to move the court for a writ of possession. 1 Smith's Chancery

---

Brief for appellee.

---

Practice, 446; 2 Ala. N. S., 158; 4 John. Ch., 609; 1 Brown Ch., 375; 2 Daniels Ch., 1280; 2 Smith Ch. Pr., 214. This being the only question we submit that the chancellor errs in his action.

*R. O. Reynolds*, for appellees:

There are but two questions presented by counsel for appellant.

1. That a writ of assistance will not be granted in any case in favor of a purchaser.

2. That the proper practice is to give to the party in possession a copy of the writ, and if not obeyed, then to move for a writ of possession.

We shall contend that neither of these positions is tenable.

From our own supreme court, the case of *Wilson v. Polk*, 13 S. & M., 132, is cited. In that case, the writ of assistance was applied for by *Wilson*, the purchaser, against *Polk* and *Edmonds*, who were in possession and who were not parties to the original suit, nor did they come in *pendente lite* under any of the parties to the original suit. A writ of assistance as against them was properly denied because they were not parties to the original suit. Judge Clayton cites 2 Smith's Ch. Pr., 214, as sustaining the doctrine announced by him.

While the text does sustain the dictum, it is not supported by authority, and the cases commented upon and cited in note a, p. 214, are in direct conflict with it. It is well settled by adjudications in all the states, and there is no conflict of authority, unless it be the case of *Wilson v. Polk*, *supra*, that a writ of assistance will be granted in favor of a purchaser not a party to the original suit. *Creighton v. Paine*, 2 Ala., 159, 160; *Stackpole v. Curtis*, 12 Eng. Ch. Pr., 585; *Thompson v. Smith*, 1 Dillon, 458; *Feris v. Hicks*, 38 Cal., 234; *People v. Doe*, 31 ib., 220; *Goit v. Dickerman*, 20 Wis., 630; *Gilcreest v. Magill*, 37 Ill., 300. The writ will not issue against a party who is not a party to the original suit, but a purchaser under a decree is a *quasi* party. 10 Humph., 81; 8 ib., 522; 2 ib., 171; 14 Vesey, Jr., 512; 15 Grattan, 288.

---

Opinion of the court.

---

The practice in obtaining a writ of assistance is not settled in this state. The English practice is hedged in with so many complications, and productive of so much delay, that it has not been followed in this country. The usual mode is to apply at the term at which the sale is reported or the decree for possession for writ of assistance. We submit this practice in simple, and in accordance with our decisions and statutory provisions and the practice in other states. *Harney v. Morton*, 10 George, 508; *Valentine v. Teller*, 1 Hopk., ch. 422.

*L. Haughton*, on same side, filed a brief, citing *Wilson v. Polk*, 13 S. & M., 132; 10 Humphreys, 81; 6 ib., 145; 8 ib., 522; 2 ib., 171-46; 3 Sumner's Rep., 318; 14 Veasey, Jr., 512; 15 Grattan, 288; *Harney v. Morton*, 10 George, 508; *Hopkins' Ch. R.* (N. Y.), 423; *Kershaw v. Thompson*, 4 John. Chan., 609; *Ludlow v. Lansing*, 1 Hopk., 231; *Creighton v. Paine*, 2 Ala., 158; *Smith's Ch. Pr.*, 214, note a.

SIMRALL, J., delivered the opinion of the court.

Two questions are presented in this case. First. The nature and office of the writ of assistance. Second. In what circumstances, and at the instance of what parties may it be invoked, under the practice of a court of equity?

The object of the writ is to put a party who has purchased real estate at judicial sale, into the possession of the premises. The most familiar instance of its use is where land has been sold under a decree foreclosing a mortgage. But manifestly it would apply to any other rule enforcing a lien, whereby the title and right of the property would pass to a purchaser. In such cases the relief attempted to be administered by the chancery court is, on the one hand, to raise by a sale of the property, the debt for which it has been incumbered, and on the other, to transfer the property to the purchaser. The vendee does not buy merely a title to the property and a right to the possession which may be enforced in a court of law, but he purchases the title and the right of imme-

---

Opinion of the court.

---

diate possession as incident to the title. A court of equity would fall short of doing complete justice, unless it put him in possession, as well as gave him a deed, the muniment of his title. Nor is there any objection to this, if the person deprived of the possession was a party to the suit, or came into possession under him *pendente lite*. *Kershaw v. Thompson*, 4 John. Ch. Rep., 609; *Creighton v. Paine*, 2 Ala. Rep., 159.

The subject was examined by Chancellor KENT, in *Kershaw v. Kershaw*, 4 John. Ch. Rep., 611, and the power was placed upon the ground of the full jurisdiction of a court of equity to administer complete and efficient relief. If it has authority to dispose of the fee, it ought also as to all the parties to the decree, to control also the possession. The power of the court would be defective and inadequate to full redress, if the suitor must resort to a court of equity to procure a decree of sale, and after investing the purchaser with the title turn him over to a suit at law, with the expense and delay incident to it, to get the possession. The case of *Dove v. Dove*, 1 Brown. Ch. Rep., 330, top p., by Perkins, and same case more fully reported in 2 Dick., 617, is much like this case. By the decree the estate of the testator was to be sold. The widow was a party to the suit. The purchaser demanded of the widow possession, which she refused. He applied to the court, pursuing the regular course of procedure, to obtain the possession, and did obtain it by the writ of assistance.

The formula is given in note to this case in 1 Brown. Ch. Rep. Service of writ of execution of the decree and of the party's refusal.

2. An attachment issued thereon.
3. Injunction granted on such attachment.
4. Writ of assistance directed to the sheriff to deliver the possession.

See also *Huguenin v. Basely*, 15 Vesey, 180. In *Ludlow v. Lansing*, 1 Hop. Ch. Rep., 232, the authority of the court to issue the writ is placed upon the power of the court to carry its decree

---

Opinion of the court.

---

into effectual execution, and thereby avoid the circuity of vexatious and useless litigation. *Gilcreest v. Magill*, 87 Ill., 800, was the case of an application by the purchaser. No substantial reason can be suggested if the person in possession was a party to the suit.

The reason is that such persons are bound and concluded by the decree. But the writ is not confined to foreclosure suits. It is applicable, to all cases, where the court has authority to decree the sale of property, and thereby transfers by sale the title, and as incident to the title the right to immediate possession. If the decree is conclusive upon all the parties to the suit, in respect to the title to the property, the subject of the decree, it should also be conclusive on the possession of any of the parties, held under that title. No party can be dispossessed by the writ rightfully, who was not a party to the suit, or who did not enter under such party *pendente lite*.

It is objected that Hooper, the purchaser, is a stranger to the suit, and that as purchaser at the sale he does not occupy such relation, as that he can, under the practice, become a suitor for the writ. The principle in *Redus v. Hayden*, 43 Miss. Rep., 636, was stated to be, "that a purchaser (at judicial sale), from the moment the property is struck off to him, is deemed a party in interest and submits himself to the jurisdiction of the court—that is, so far as his rights as purchaser and his obligations are concerned. 2 Dan. Ch. Pr., 1272, 3. He may move for a confirmation of the sale, and to be let into possession after he has done everything as respects the sale incumbent on him. *Ibid*. If the sale is upon a credit, the purchaser becomes a party to the suit for all the purposes of enforcing payment of his bond by rule to pay the money into court, or by an order to sell the property. *Clarkson v. Read*, 15 Gratt., 295.

Purchasers on a credit of one, two and three years were immediately let into possession. Upon their petition, a nuisance (the obstruction of a street with reference to which the lots were sold) was abated. *Leake v. Cannon*, 2 Humph., 169.

---

Opinion of the court.

---

In the cases above cited, of *Gilcreest v. Magill*, 37 Ill., 300, and *Creighton v. Paine*, 2 Ala., 158, and most of the others, the application to the court for its assistance to be put in possession was made by the purchaser.

We have already stated to what extent, and for what purposes the purchaser becomes a party and submits to the jurisdiction of the court. He can be compelled to pay the purchase money, or to do whatever else is necessary to complete the sale, such as accepting the deed. It would seem to be but reciprocal right that he should have the aid of the court, to be put in complete enjoyment of his purchase. There is nothing in the case of *Wilson v. Polk et al.*, 13 S. & M., 132, which militates against these views and authorities, except the expression in the opinion, that "the purchaser can only proceed by getting the vendor to make the application for the process." The authorities, both in England and in this country, are abundant, that the purchaser may petition in his own name. But in that case Parker was complainant against Baker and Starr, defendants. The application was to turn Polk and Edwards (who were not parties), out of possession. The judgment was plainly right, for one of the reasons assigned by the court, viz: "In a mere order for process, a person might be turned out of possession, whose rights had never been tried."

If the record of the proceedings in the chancery court would be conclusive evidence of the purchaser's right of recovery, as against the defendant in possession at law, *cui bono*, multiply litigation, by remitting the party to the court of law. On the hearing of the application for the writ, the defendants thereto would be allowed to show the invalidity of the decree as that it was void; the same matter that would defeat the recovery in ejectment.

The modern practice permits a proceeding simpler and less tedious than formerly prevailed, yet retaining all that is essential in the ancient formula. It seems to be enough to file a petition setting forth the sale under the decree, the purchase, and the deed

---

Opinion of the court.

---

by the commissioner, confirmation of sale, payment of the money if made for cash, that the deed was exhibited to the defendant and possession demanded, and praying that the writ may issue. The defendant should have reasonable notice of such application. 1 Hopkins' Rep., *supra*; 2 Ala., *supra*. There was no objection in the chancery court to the form of the application. Both parties seem to have contested on the merits. For that purpose they made an agreed state of facts.

Let the decree awarding the writ be affirmed.

---

JOE BURNHAM v. G. M. D. SUMNER.50 517  
87 177

1. SUPERINTENDENT OF EDUCATION — TERM OF OFFICE. — The constitution, art. 8, sec. 5, limits the terms of office of county superintendents to two years, and makes no provisions for their holding over until their successors are appointed and qualified. It was, therefore, *ultra vires* of the legislature to increase or extend their term of office beyond the constitutional limitation.
2. SAME — QUALIFICATION — ACT OF APRIL 17, 1873. — Sec. 27 of the act of April 17, 1873, requiring an applicant, before he can be appointed county superintendent of education, to submit with his application a certificate from the board of examiners, setting forth his educational qualifications, habits and moral character, and executive ability, is constitutional, and an appointment made by the state board of education without such certificates is invalid.

ERROR to the Circuit Court of Holmes County. Hon. W. B. CUNNINGHAM, Judge.

The facts in this case are very plainly set forth in the opinion of the court.

*Allen & Dyson*, for plaintiff in error.

*R. A. Anderson & G. E. Harris*, for defendant in error.

PEYTON, C. J., delivered the opinion of the court.

This is a writ of error from a judgment upon an information in the nature of a *quo warranto*.



---

Opinion of the court.

---

The relator, G. M. D. Sumner, alleges, in his information, that on the 7th day of January, 1875, he was appointed by the state board of public education, superintendent of public education for Holmes county, and that his appointment to said office by said board of public education as aforesaid, was confirmed by the senate of the state of Mississippi, on the 20th day of January, 1875.

The respondent, Joseph Burnham, alleges in his answer, that on the 7th day of November, 1872, he was appointed by said board of public education, superintendent of public education for Holmes county, and that his said appointment was confirmed by the senate of said state, on the 31st day of January, 1873, and insists that he has a right to hold said office until his successor is duly appointed and qualified to enter on the discharge of the duties of the office. That the relator was not legally appointed to said office, because he was not examined by a board of examiners of said Holmes county, as to his educational qualifications, his habits and moral character and his executive ability, and that he had not given bond as required by law.

The fourth section of the eighth article of the constitution provides that there shall be a superintendent of public education in each county, who shall be appointed by the board of education, by and with the advice and consent of the senate, whose term of office shall be two years. According to this limitation in the constitution, Burnham's term of office could not continue longer than the 31st day of January, 1875, and he could not legally hold said office any longer, unless he was authorized by law to hold the same until his successor was qualified to enter upon the duties of the office. No officer, named in the constitution, whose term of office is prescribed therein, can hold for a longer period than that specified in that instrument. The twenty-second section of the fifth article of the constitution provides that all officers named in this article shall hold their offices during the term for which they were elected, unless removed by impeachment or otherwise, and until their successors shall be duly qualified to enter on the dis-

---

Opinion of the court.

---

charge of their separate duties. The county superintendent of education is not one of the officers named in that article, and therefore he has no right to hold over his term. And the legislature has no power to extend the term of any of these officers beyond the time prescribed by the constitution, unless authorized by that instrument. As there is nothing in the constitution authorizing Burnham to hold over after the expiration of his term of office, it necessarily follows that he had no right to the office in controversy after the 31st day of January, 1875.

It now remains to inquire whether or not Sumner is entitled to it. The twenty-seventh section of "an act to amend the laws of the state in relation to public education," approved April 17, 1873, "provides that before any person shall be appointed to the office of superintendent of education in any county in this state, he shall procure a certificate from the board of examiners, setting forth his educational qualifications, habits and moral character and executive ability, and the state board of education shall in no case appoint any person to be superintendent in any county who does not submit such certificate with his application for appointment.

It is conceded that Sumner never was examined by said board of examiners and that he did not procure the certificate required by said act before his appointment by the state board of education to the office of superintendent of public education for said county of Holmes. If this act be a legitimate exercise of legislative power under the constitution, the certificate therein required is a condition precedent to the legality and validity of the appointment. As the durability of our republican institutions very much depends upon the virtue and intelligence of the people it is of vast importance that those who aspire to become superintendents of public education shall have some qualifications for that office, and with this view, no doubt, the act was passed. And although the state board of education derive their power to make the appointment from the constitution, it was competent for

---

Opinion of the court.

---

the legislature to prescribe that the applicant for the position should furnish some evidence of his qualifications to the board of education at the time of making his application, and this was to be done by procuring the certificate of the board of examiners."

The leading rule in regard to the judicial construction of constitutional provisions is a wise and sound one, which declares that, in cases of doubt, every possible presumption and intention will be made in favor of the constitutionality of the act in question, and that the courts will only interfere in cases of clear and unquestioned violation of the fundamental law. Sedgwick on the Construction of Statutory and Constitutional law, 409. Where the purpose and object of the act is so good and laudable as that under consideration, we should hesitate long before we declared it unconstitutional, unless it were clearly so.

The duty of the court to uphold a statute when the conflict between it and the constitution is not clear, and the implication which must always exist that no violation has been intended by the legislature, may require it in some cases, where the meaning of the constitution is not in doubt, to lean in favor of such construction of the statute as might not at first view, seem most obvious and natural. For as a conflict between the statute and the constitution is not to be implied, it would seem to follow, where the meaning of the constitution is clear, *that the court, if possible, must give the statute such construction as will enable it to have effect.* Cooley on Constitutional Limitations, 184.

Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution and give it the force of law, such construction will be adopted by the courts. An inquiry into the validity of an act on the ground that it is unconstitutional, is an inquiry whether the will of the representative as expressed in the law, is or is not in conflict with the will of the people as expressed in the constitution. And unless it be clear that the legislature has transcended its authority, the courts will not interfere.

---

Syllabus.

---

Acts of the legislature constitutionally organized are presumed to be constitutional, and it is only where they manifestly infringe some of the provisions of the constitution or violate the rights of the citizen, that their operation and effect can be impeded by the judicial power.

The construction which we have given to the act in question will tend to secure the appointment of superintendents of education for the various counties in the state, who have character, qualification, capacity and ability to perform the important functions of that office, upon the faithful discharge of which, the future weal and prosperity of the state largely depend. This construction does not detract from the constitutional power of the state board of education to make these appointments. But their judgment and discretion must be exercised in the selection and appointment of county superintendents of education from those applicants for the office, who produce the required certificate of qualification.

If these views be correct, it follows that Sumner's appointment to the office of superintendent of education of Holmes county is invalid, and cannot be sustained.

For these reasons, the judgment must be reversed and the information dismissed.

---

MARY KIRKPATRICK, Adm'r, v. GEORGE MILLER et al.

1. COVENANTS OF WARRANTY — BREACH THEREOF. — The authorities are not agreed as to the extent of the general covenant of warranty, and what will constitute a breach thereof. It is generally conceded, that if the vendee is sued in ejectment, or a demand of the premises is made by the owner of the better title, he may surrender the land and resort to his covenant. *Loomis v. Bedell*, 11 N. H., 74.
2. SAME — SAME — EVICTION. — An eviction under legal process is not necessary to give the covenantee a remedy on the warranty. It is not necessary for him to defend against a title which he is satisfied must eventually

50	521
72	574

---

Statement of case.

---

prevail. *Hamilton v. Cutts*, 4 Mass., 849. If his title was invalid he might abandon the possession.

3. **SAME — CONSTRUCTIVE EVICTION — GENERAL RULE.** — The great weight of American authority is, that if the covenantee has been obliged to purchase a paramount title, which was being asserted against him, and under which he must ultimately be evicted, this amounts to a constructive eviction, and he may sue upon the covenant. *Estabrook v. Smith*, 6 Gray, 572.
4. **SAME — RULE IN THIS STATE.** — In this state the covenant is given a more restricted operation and the cases confined within narrower limits the doctrine of technical eviction. The rule established by the cases is, that in order to recover upon the covenant, there must be an eviction or there must, at the time of the sale, have been an adverse possession under paramount title, holding the vendee out. *Burrus v. Wilkinson*, 81 Miss., 537; *Witty v. Hightower*, 12 S. & M., 481; *Dennis v. Heath*, 11 S. & M., 218.
5. **SAME — RULE IN EQUITY.** — Whilst a court of equity holds the vendee to entire good faith to his vendor, and will not permit him to buy in an outstanding title or incumbrance and set it up in opposition to his vendor, yet it will lend its aid to reimburse all reasonable advances expended to fortify the title. At the same time it will rebuke every attempt by the purchaser to invalidate the title. *Champlin v. Dotson*, 13 S. & M., 553.
6. **SAME — RULE AT LAW — ASSUMPSIT.** — Assumpsit being in its nature an equitable remedy, applicable to those circumstances where the defendant ought in equity and good conscience to pay money, but which is not recoverable in debt or covenant, will lie against the covenantor to recover the money paid by a vendee, to buy in an outstanding paramount title or lien. An *actual* eviction is not necessary before assumpsit will lie. A constructive or equitable eviction is sufficient.

ERROR to the Circuit Court of Lafayette County. Hon. ORLANDO DAVIS, Judge.

Plaintiff's declaration in the court below alleged that defendants' intestate, in his life time, sold to plaintiff's testator a tract of land, executing a deed thereto, with covenants of warranty. That under said deed the testator took possession. That afterwards, the heirs of one Wylie brought an action of ejectment against the testator, claiming adversely to the deed, and that they recovered judgment, under which a writ of *habere fucias* issued against the testator. That the testator then bought in the title of the Wylie

---

Brief for plaintiff.

---

heirs. The damages claimed was the amount expended and the interest thereon.

The defendants demurred to the declaration on the grounds: 1. That the declaration was not in covenant, but in debt. 2. That the declaration is for money paid, and no legal cause of action for money paid, is shown. 3. That no breach of the covenant set out in the declaration is shown.

The court below sustained the demurrer, and dismissed the declaration.

Plaintiffs sued out a writ of error to this court, and assign as error:

1. That the court below erred in sustaining the demurrer and dismissing the declaration.

*Lamar & Mayes*, for plaintiffs in error, contended:

1. That even in the action of covenant, which is purely a common law action, and controlled by the technicalities of the common law, judgment in ejectment and issuance of the writ of *habere facias* is equivalent to an eviction, and will support the action. *Kellogg v. Platt*, 33 N. J. (4 Vroom.), 328; *King v. Kerr's Adm'rs*, 5 Ohio, 155; 4 Mass., 348; *Johnson v. Nyce's Ex'rs*, 17 Ohio, 66; *Tuite v. Miller*, *Western Law Journal*, vol. 5, p. 413; *Beebe v. Swartwout*, 3 Gilm., 162, 184; *Moore v. Vail*, 17 Ill., 185; *Brady v. Spurek*, 27 Ill., 478.

2. That if the averments of the declaration are not sufficient to sustain an action of covenant, they are amply so to sustain the equitable action of assumpsit for money paid, and the demurrer should have been overruled. Code of 1871, § 577.

3. That under our practice a recovery can be had for money paid in the action of assumpsit, without an eviction or its equivalent. *Hardeman et al. v. Cowan*, 10 S. & M., 486; *Champlin et al. v. Dotson*, 13 S. & M., 553; *Hill v. Samuel et al.*, 31 Miss., 307; *Harper v. Reno et al.* *Freeman's Ch. R.*, 323; *Cromwell v. Craft*, 47 Miss., 44; *Rundell v. Lakey et al.*, 40 N. Y. (1 Hand.), 513; *Bridges v. Pierson*, 1 Lansing, (N. Y.), 481; *Hunt v. Amidon*, 4 Hill (N. Y.), 345; *Cowdrey v. Coit*, 44 N. Y., 382.

---

Opinion of the court.

---

*H. A. Barr*, for defendants in error, insisted :

1. That it had been well settled in this state that the covenant of general warranty is not broken without an *actual eviction*. The covenantee may voluntarily yield possession, but he cannot recover for a breach until he has either coercively or voluntarily yielded possession. As long as he remains in possession of the premises, there is no breach of the covenant. *Burrus et al. v. Wilkinson*, 31 Miss., 544; *Witty v. Hightower*, 12 S. & M., 481; *Dennis v. Heath et al.*, 11 S. & M., 218; *Hoy v. Taliaferro*, 8 S. & M., 727.

2. That in this state we have no constructive eviction, which obtains in some of the states, but our courts adhere to the old doctrine that there must be an *actual eviction* to constitute the breach of the covenant of warranty.

3. That the law raises no assumption without a breach of the covenant. And even if the defendants had expressly promised, it is well settled in this state that administrators have no authority to create liabilities or impose burdens on the estates represented by them. *Hagan v. Barksdale*, 44 Miss., 191.

4. That no action, but the action of covenant could be maintained. 1 *Chitty's Pl.*, 109, 113; *Rawle on Covenants for Title* pp. 634, 635.

SIMRALL, J., delivered the opinion of the court :

This suit arises out of this condition of facts : H. R. Miller sold and conveyed on the 18th of June, 1860, to Alexander Kirkpatrick, a section of land, and covenanted to warrant and defend the title to the said Kirkpatrick, his heirs, etc., against all persons whatsoever, under which deed the vendee took possession. Afterwards, the heirs of one John N. Wylie, claimed title to the premises, sued in ejectment and recovered judgment and took out the writ of *habere facias possessionem* against Kirkpatrick, who, to protect his possession, bought in the title of the heirs of Wylie for \$698.60.

---

Opinion of the court.

---

This action was brought by the administratrix with the will annexed of Alexander Kirkpatrick, deceased, against the administrators of H. R. Miller, deceased, to recover the sum expended by her testator to get in the title of Wylie's heirs under which he was about being evicted. A demurrer was sustained to the declaration, and the suit dismissed.

The question made in this court is, that the declaration contains a good cause of action, and the demurrer ought to have been overruled.

The action is not grounded upon the covenant, but the covenant is treated by the pleader, as matter of inducement; and the gravamen of the complaint is, that Kirkpatrick had paid money, which, under the circumstances, Miller ought to have paid; and which was therefore laid out for his use.

The authorities are not harmonious as to the extent and scope of the general covenant of warranty and what will constitute a breach of it. It seems to be generally conceded that if the vendee is sued in ejectment, or a demand of the premises is made by the holder of the better title, he may surrender the land and resort to his covenant. *Loomis v. Bedel*, 11 N. H., 74; *Hamilton v. Cutts*, 4 Mass., 349. An eviction under legal process is not necessary to give the covenantee a remedy on the warranty. There is no necessity for him to involve himself in litigation, to defend against a title which he is satisfied must ultimately prevail. 4 Mass., 349, *supra*. If his title was invalid he might abandon the possession. He owed the covenantee no duty to remain in possession and bear the perplexities and expense of a useless defense, when his title must fail. *Haffey's Heirs v. Birchetts*, 11 Leigh, 88; *Woodward v. Allen*, 3 Dana, 164; *Sterling v. Peet*, 14 Conn., 254.

The great weight of Cis Atlantic authority is in favor of the position, that if the covenantee has been obliged to purchase a paramount title, which was being asserted against him, and under which he must ultimately have been evicted, this amounts to a



---

Opinion of the court.

---

constructive eviction, and he may sue upon the covenant. *Whitney v. Dinsmore*, 6 Cush., (Mass.) 124; 3 Met. (Mass.), 81. *Estabrook v. Smith*, 6 Gray, 572; *Kelly v. Low*, 18 Maine, 244; *Dupuy v. Roebuck*, 7 Ala., 438; *Sprague v. Baker*, 17 Mass., 590.

The cases in our own books give the covenant a more restricted operation, and seem to confine within narrower limits the doctrine of technical eviction.

In *Burrus v. Wilkinson*, 31 Miss., it is laid down, that a covenant of general warranty has not been broken so long as the vendee has not been dispossessed, either by judicial process or by actual yielding possession to a paramount title. It is also held that such covenant is not broken by purchasing in an outstanding title, under which the vendee might have been evicted. In *Witty v. Hightower*, 12 S. & M., 481, the purchaser bought an outstanding paramount title, and claimed that thereby had occurred a breach of the covenant. But the court held that was not enough; there should be an eviction, or at the time of sale there was, in a stranger, a paramount title and adverse possession under it, holding out the purchaser, which would be equivalent to an eviction. In *Dennis v. Heath*, 11 S. & M., 218, it was said that a recovery in ejectment did not work a breach of the covenant because that did not destroy the seizin of the vendee. Entry under the judgment, either with or without legal process, causes the eviction. These cases establish the rule in this state, that in order to recover upon the covenant there must have been an eviction, or there must at the time of the sale have been an adverse possession under paramount title, holding the vendee out. If this action were technically founded upon the covenant of warranty, the plaintiff could not sustain it under these cases. It has long been a doctrine of courts of equity, that if a trustee, mortgagee, tenant for life, or a purchaser, buys in an outstanding title or incumbrance, he shall not use it for his own benefit and to the annoyance of him under whose title he entered, but shall be considered as holding such title or incumbrance in trust. *Meadows*

---

Opinion of the court.

---

v. Hopkins, 4 Monroe, 297-8; 2 John. Ch. Rep., 83. After doing homage to his vendor's title by purchase and entry under it, the vendee will not be tolerated to repudiate his allegiance to it, and transfer it to another title acquired whilst thus in possession. If such after acquired title should be paramount, the vendee shall be esteemed as holding it in trust for his vendor, as having provided it to support and maintain his possession and his right under his original vendor.

Whilst a court of equity holds the vendee to entire good faith to his vendor, and will not allow him to get in an outstanding title or incumbrance, and set it up in opposition to his vendor, yet it will lend its aid to reimburse all reasonable advances expended to fortify the title. At the same time it will rebuke every attempt by the purchaser to betray or invalidate the title. *Holridge v. Gillespie*, 2 John. Ch. Rep., 32, 33; *Champlin v. Dotson*, 13 S. & M., 656.

The vendee is not permitted to speculate or make personal gain; therefore, he is limited to a reimbursement of the actual amount he has expended to protect his title and possession. *Hill v. Samuel*, 31 Miss., 311. The principle which has been sanctioned, and frequently acted upon by courts of equity, may be thus expressed. If, in good faith, the purchaser has laid out his money to extinguish an incumbrance, or to procure a conveyance of paramount title, while he cannot assert such incumbrance or conveyance to defeat the title accepted from his vendor, yet, since the outlay was necessary for the support and protection of his right and possession, the vendor shall pay it back. The doctrine rests upon this footing: the vendor is under a covenant to warrant and defend the title to the vendee, his heirs and assigns. Such covenant includes the idea of quiet enjoyment. But the vendee, by timely interposition, has bought in a title or incumbrance which would have swept away his possession, and has thereby kept the covenant of the vendor unbroken. He has done what was necessary for his own safety, and what was incumbent primarily on the vendor. If

---

Opinion of the court.

---

he had waited until a recovery had, then he could have pursued his covenant, and recovered the price paid for the land.

The proposition contained in the plaintiff's declaration is, that a court of law shall do what has long been a favorite relief in equity. Assumpsit is a special action on the case. If these could not be found in the *officiana brevium* of the court of chancery, the form of an original writ, adapted to the special circumstances, the practice was tolerated by framing a special writ, and hence the name of the action. Assumpsit has been justly called an equitable action, applicable to those circumstances where the defendant ought, in equity and good conscience, to pay money, but which is not recoverable in debt or covenant. If there be not an express promise, then, if the defendant is under a duty to pay, the law implies a promise.

The covenant of Miller in effect was, that Kirkpatrick should continue in the undisturbed enjoyment of the land, and that he would shield it from conflicting titles and claims. If necessary, that he would buy them in for his vendee. Kirkpatrick was about being turned out of possession by legal process. If he had waited for an eviction by the sheriff, he could immediately have recovered from Miller, on his covenant, the entire consideration money paid for the land. If that sum was larger than the price paid for the successful title, Miller was benefited to the extent of the difference. Upon what principle of equity should Kirkpatrick stand aside until actually evicted, so as to secure a remedy upon the covenant, when for a much less sum, and at less cost to his covenantor, he might protect the title?

There is great force in the reasoning of those courts, that regard the buying in of the better title after demand made, or suit brought as a constructive, or, as sometimes called, an equitable eviction, and a breach of the covenant. It is the equivalent of a surrender of possession, and then a purchase from the paramount owner. Why, if the conduct of the covenantee is free from collusion, and in good faith, require the mere ceremony of a

---

Opinion of the court.

---

surrender before purchase, there would seem to be no substantial reason why that ceremony might not be named, and a purchase, whilst in possession, be accepted as the equivalent of an abandonment of the bad title, and a holding under the newly acquired good one, or as amounting in law to an eviction.

Those states that have adopted such a transaction, as a constructive, or, as sometimes called, an equitable eviction, and a breach of a covenant, have evidently borrowed the principle from courts of equity, and have, on account of its intrinsic justice and reasonableness, given to it the same remedial extent which it there had, viz : a recovery, not of the original consideration, but of the actual sum paid for the better title.

Since our adjudications adhere more closely to the ancient doctrine, and do not consider a demand made, or the recovery in ejectment, and the purchase of the better title by the covenantee, as the equivalent of an eviction, and breach of the covenant, we ought, surely, to give that liberal extension to the action of assumpsit as to allow the covenantee to recover from the warrantor the money which he has paid for the paramount title, in analogy to the redress which the courts of law elsewhere afford upon the covenant to extinguish the adverse claim. Upon what seems to us sound reasons, the principle which supports this action was recognized in *Hunt v. Amidon*, 4 Hill, N. Y., 346-7-8. There, the land was bought in by the vendee under a mortgage made by his vendor; who successfully brought the action of assumpsit for the sum bid. It was conceded by the court to be doubtful whether a suit could not be maintained upon the covenant; but the plaintiff had paid out money which relieved his title and assured his possession, which his covenantor was under a primary obligation to pay.

The principle finds an apt illustration in *Exall v. Partridge*, 8 T. R., 308. There, the plaintiff's carriage, being found on demised premises, was distrained for the rent; in order to release

---

Opinion of the court.

---

his carriage, the plaintiff paid off the rent and brought *assumpsit* against the tenant.

No priority of contract existed between the plaintiff and the defendant. But the plaintiff was constrained by the seizure of his property, to pay a debt which the tenant was in equity and justice bound to pay, and it was not straining too much to hold that it was laid out and expended for the defendant's use.

These expositions of the principle resting, as the cases do, upon solid reasons, go to the extent of holding that if the vendee of property, exposed to imminent danger of its loss, by an outstanding, paramount lien or title, is constrained to lay out money to clear off the title and protect the enjoyment, he may advance the money in order to avoid an eviction; and such payment is for the use and benefit of his warrantor. The covenantor has agreed that the vendee shall not suffer harm or injury from adversary claimants, and that he will indemnify him. He is under a primary obligation that the purchaser shall not lose the property to a claimant under a better right. If, therefore, such title is about to sweep away the property, the vendee who saves it has paid out money which his covenantor ought to have paid, and which, in equity and conscience, he ought to refund.

In such circumstances, a court of equity would relieve. No sound, substantial reason is perceived, why a court of law should not, in the like circumstances, extend to suitors the use of its speedier and cheaper equitable action of *assumpsit*.

If the covenantor Miller had notice of the action of ejectment, so that he might have taken part in the defense, then the recovery in that action would be conclusive, that the plaintiff's title was paramount. If he did not have notice, in addition to the proceedings and judgment in that suit, the plaintiff in this action must show by testimony *aliunde* that such title was paramount. *Pickett's Adm. v. Ford*, 4 How., 246.

We are of opinion that, under the circumstances disclosed in the declaration, the plaintiff is entitled to recover the sum paid to

## Syllabus.

Wylie's heirs, if that sum is less than the liability of the defendant's intestate on his covenant. Of course, in this action, a sum in excess of that could not be recovered.

Let the judgment of the circuit court be reversed, and judgment be rendered here overruling the demurrer, and the cause be remanded for further proceedings.

—◆—

E. N. McDUFF et al. v. D. C. BEAUCHAMP, Sup't, etc.

1. **MARRIED WOMEN—SEPARATE PROPERTY—MORTGAGES THEREOF.**—It is well settled in this state that the power of a married woman to mortgage her separate estate is limited to securing those debts which she is permitted, under the statute, to incur, and for the separate debts of her husband; but, in this case, only to the extent of the income. *Viser v. Scruggs*, 49 Miss., 713. A mortgage on the wife's separate property to secure a note made by husband and wife, is valid as to the income, under § 23, Code 1857, p. 336.
2. **CONVEYANCE TO HUSBAND AND WIFE—EFFECT THEREOF.**—A conveyance to a husband and wife jointly creates an estate of entirety. It does not make them joint tenants or tenants in common, under the statute. Both are seized of the entirety, and have none of the incidents of cotenancy. Neither can alien without the consent of the other, and the survivor takes the whole.
3. **ESTATES OF ENTIRETY—HOW CREATED, ETC.**—A conveyance that would create a joint tenancy in others, makes husband and wife tenants of the entirety. Such estates exist in this state as at common law, and were not abolished by art. 18, Code 1857, p. 309. Such estates are not affected by the statutes for the preservation and protection of the separate estates of married women, and the marital rights therein exist as at common law. As they can be alienated in fee by a joint deed of husband and wife, so they can be incumbered in the same way.
4. **SUITS BY OFFICERS—REVIVAL THEREOF.**—Although there is no statute in this state authorizing a suit brought by an officer to be prosecuted in the name of his successor, yet it has long been the practice in this state to allow it. A change in the incumbent of an office, pending the suit, does not abate the suit and make it necessary to begin *de novo*, if the successors are charged with the same duties.

---

Statement of the case.

---

5. SAME — SUPERINTENDENTS OF EDUCATION. — The duty of collecting school funds devolves by law upon county superintendents. Any suit brought by them is in virtue of their office. The county superintendent is the litigant, though the incumbent may have changed several times before the final derermination of the suit.

APPEAL from the Chancery Court of Leake County. Hon. SAMUEL YOUNG, Chancellor.

R. J. Edmonds, being indebted to the township school fund, in 1859, and having mortgaged his land to secure the debt, and desiring to free his land from this mortgage, induced his sister, E. N. McDuff, and her husband, R. F. McDuff, to assume his debt and mortgage the lands in controversy to secure it. This bill was filed to foreclose this mortgage. The decree was for the sale of the land embraced in the mortgage by a commissioner. The deed to the land mortgaged was made to McDuff and wife jointly by Leflera.

The errors assigned, are :

1. That the note and mortgage whereon said decree was made, were given by a married woman, in 1859, and were void as to her, being such a contract as she was not authorized by law to make, and therefore no decree should have been made against her.
2. Said decree is erroneous, because it directs the sale of the *corpus* of her said estate, whereas said note and mortgage were not for her debt, but for the debt of her husband ; the said note not being obligatory on her, but only on her husband, and if said mortgage was valid at all, it was only binding on the income of her said estate.
3. Said decree is erroneous, because said suit was commenced by H. H. Howard, county superintendent, and revived in favor of Beauchamp, his successor in office, against the objection of appellant ; and said decree is in favor of Beauchamp, while no law authorizes such revival.

---

Briefs.

---

*J. A. P. Campbell*, for appellants, insisted :

1. That the assumpsit by a married woman of the debt of another is not such a contract as she is authorized by law to make. That if it was the debt of her husband, she could do no more than bind the income of her separate property.

2. That if the title was vested in husband and wife, they held by entireties, and it could not be conveyed, except by act of both, and if the wife cannot incumber her estate beyond its income for the debt of her husband, she could not convey her interest as tenant of the entirety. Her interest in the entirety is as much her property as any other she holds, and is protected by the statute as other separate property of married women.

3. That the suit having been brought by Howard, should not have been revived by Beauchamp, his successor in office, as there is no law for such revivor. *Portevant v. Pendleton*, 23 Miss., 25; *Allen v. Mandeville*, 26 Miss., 397. A statute giving the right to sue and collect does not give the right to revive a pending suit. *Torry v. Robertson*, 24 Miss., 192.

*George Hine*, for appellees, contended :

1. That the deed to the land mortgaged was made to McDuff and wife, thereby creating them tenants in entirety, and hence there could be no separate property within the meaning of the statute in the wife, and cited *Hemingway v. Scoles*, 42 Miss., 15.

2. That although McDuff and wife may have taken the deed under a misapprehension of its legal effects, this could not affect the rights of the mortgagees who were such for value.

*G. E. Harris*, attorney general, for appellee, filed an elaborate brief, relying substantially upon the same points made in the brief of the associate counsel, and in addition insisted, 1. That if the slave, which was in part exchanged for the land mortgaged to the school trustees, was acquired by Mrs. McDuff prior to the passage of the married woman's law of 1839, it vested absolutely in the husband; *Sharp v. Maxwell*, 30 Miss., 589, and if the cash used was acquired prior to the married woman's law of 1857, it also belonged to the husband.



---

Opinion of the court.

---

SIMRALL, J., delivered the opinion of the court:

The foreclosure of the mortgage is resisted upon several grounds. It is averred in the answer that Mrs. McDuff did not make the acknowledgment within the terms of the statute. The certificate of the probate clerk, before whom it was made, recites an almost literal compliance with the law.

It is also set up that the bill single, the evidence of the debt, is not obligatory upon Mrs. McDuff because of her coverture; that the mortgage is invalid as a security; or if available at all, only to the extent of the income of the mortgaged premises.

The brother of Mrs. McDuff was indebted to the trustees of the school fund, by note and mortgage, and having an opportunity to sell his land thus incumbered, he induced his sister and her husband to substitute their obligation and the mortgage in question, so as to relieve his land. The land thus mortgaged by McDuff and wife had been long prior thereto, conveyed to them jointly, as husband and wife. They aver, however, that the consideration paid to their vendor was the separate means of the wife, and that in equity she is the exclusive owner of the property, constituting, under the statutes, a separate estate in her.

It has been held, that the power of a married woman to mortgage her separate property is limited to securing those debts which she is permitted under the statutes to incur; and, secondly, for the debts of the husband, but that only to the extent of the income. *Viser v. Scruggs*, 49 Miss., 713-714; *Dibrell v. Carlisle*, 48 Miss., 706; *Foxworth v. McGehu*, 44 Miss., 432. These authorities further hold that a mortgage on the wife's separate property, to secure a note made by husband and wife (to which note the plea of coverture would be a valid defense at law) is nevertheless a valid security, to the extent of the income of the property, because such note is obligatory on the husband, and such mortgage is good, within the intentment of the last clause of sec. 23, p. 336, Code of 1857. See also *Whitworth v. Carter*, 43 Miss. Rep., 61. If it were true, then, that the lands embraced in the mortgage were

## Opinion of the court.

Mrs. McDuff's separate property, the mortgage would take hold of, and be effective as to its income.

But the estate which vested in McDuff and wife, by the conveyance from Leflere to them, was an estate of entirety. The legal effect of a conveyance to husband and wife, is not to make them joint tenants, or tenants in common; under the statute both are seized of the entirety, and have none of theunities and incidents to covenant. Both being seized of the entirety, neither could alien without the consent of the other, and the survivor would take the whole. The same deed which would create an estate in joint tenancy in other persons, make husband and wife tenants of the entirety. Coke on Litt., 187, b. 2 Black, 182; 2 Kent Com., 132. In Hemmingway, Adm'r, v. Scales, 42 Miss., 16 and 17, it was held, that this sort of estate existed in this state as at common law. That it was not abolished by art. 18, p. 309, of the Code of 1857, declaring "all conveyances \* \* to two or more persons, shall be construed to create estates in common, and not in joint tenancy." The main purpose of this statute was to do away with the common law incident of the *jus accrescendi* of joint tenancy, so that the interest of each tenant might descend to the heir, instead of going to the survivor. In that case the surviving wife took the whole estate. Both husband and wife are seized of the entirety. Torry v. Torry, 14 N. Y., 430. And take but one estate. Taul v. Campbell, 7 Yer. Tenn. Rep., 333.

[Has Mrs. McDuff such an estate, as is "separate" within the meaning of the statutes for the protection of the property of married women? In Golet v. Gori, 31 Barb., 314, the single point considered by the court was, as to the effect of the New York statute on that subject (which is much like ours), on a conveyance to husband and wife; it was ruled that it had no application to such an estate. These statutes were not designed to embrace estates, which the *feme covert* takes and holds jointly with her husband, but those which she takes and holds (to the extent defined) as if she had no husband. The marital rights remain as

---

Opinion of the court.

---

they were at the common law, unaffected by the statutes framed for the protection of the separate property. *Torry v. Torry*, 14 N. Y., 430. *Bank v. Gregory*, 49 Barb., 162.

One of the incidents of the estate is that it can only be alienated by the joint act of the husband and wife. We think that the mortgage made by them, to the trustee of the common school fund, is valid.

A separate conveyance by the husband would pass no present interest to an alienee. This estate as we have seen, is not affected by the statute which converts the estate of joint tenants into tenancy in common, nor by the statutes for the preservation and protection of the separate property of married women. It has always been the mode in this state, and perhaps now in all the American states, where jurisprudence has been derived from the common law, to transfer by joint deed of husband and wife, the real estate of the wife owned at the time of the marriage, or subsequently acquired, or an estate jointly held by husband and wife. Under our statute the deed conveys the fee simple title. That assurance has become the substitute for the common law modes. It would follow then that as at the common law an alienation of the estate of entirety could be made by husband and wife; it can be done here by a joint deed properly sealed and acknowledged. Since they could convey absolutely the ordinary deed of bargain and sale, they could also mortgage the property which, strictly speaking, is the conveyance of a conditional estate. The reasoning of the court in *Sessions v. Bacon*, 26 Miss., 273 was, if the husband and wife may make an absolute alienation, it was clear a lesser one by mortgage could be conveyed. Inasmuch as the power to convey by proper deed existed without limitation or restriction, a lesser estate than the absolute fee might be transferred. The statute of 1857, putting a restriction on the power of mortgaging the wife's property, modifies the law as it existed at that time.

But it is argued for Mrs. McDuff that, because her separate prop-

---

Opinion of the court.

---

erty paid the price of the land, a trust was raised for her benefit, which in equity made her the owner.

That, however, would be but a secret claim, which could not prevail against the mortgagees, who were such for a valuable consideration. *Love v. Taylor*, 26 Miss., 574, and cases there cited. The consideration of the mortgage and bill single is, the extinguishment and payment of the note and mortgage of the brother of Mrs. McDuff to the school trustees.

The further defense made in the answer, that the deed was intended to be made from Lafore to Mrs. McDuff alone, is not seriously insisted upon in this court. The proof is, that the conveyance was purposely made to husband and wife, under a mistake of law, that it could not be made to the wife alone. In that view, the conveyance was executed as desired, but the legal effect does not conform to the view of the parties. Clearly, parties accepting from McDuff and wife a mortgage, would not be affected by such defense as this.

It was also insisted that the suit abated by the expiration of Howard's term of office, and that it was error to substitute Beauchamp his successor, as complainant in his stead.

This suit was begun by Howard, county superintendent, and upon his retirement from office was continued in the name of Beauchamp, his successor. It is contended that the expiration of the term of office of Howard wrought an abatement of the suit; and there is no law authorizing its revival and prosecution by his successor. We know of no statute applicable to this state of facts. We believe, however, that the practice has long prevailed in this state, to allow a successor in office to prosecute a suit instituted by his predecessor. For many years, the bonds of officers were payable under the law to the governor; those of executors, administrators and guardians, to the judge of probates. It was never supposed that a change of the incumbents of these offices, abated a pending suit in the technical sense. In *Portevant v. Pendleton*, Adm'r, 28 Miss. Rep., 40, it was said that "by the common law all

---

Opinion of the court.

---

personal actions abated by the death of either party before judgment," and that it is by statutes in England and this country, that the evil was remedied by allowing the bringing in of the representatives of the decedent by *scire facias*. That writ at the common law was confined to the service of a judgment by the representatives, so that they might get its fruits. But is there not a difference between the death of a person, and the dissolution of an office by death, resignation or expiration of a term upon a successor. The office still exists, although the incumbents may be perpetually changing. The auditor of public accounts, the treasurer, secretary of state, exert a portion of the public authority in discharging official duties imposed by law. So of the superintendents of education for the state and the several counties. In the official acts performed by them they have no personal interests. The duty of collecting school funds is imposed upon the county superintendent. Any suit he may bring is in virtue of his office. The county superintendent is the litigant, though the incumbent may have changed several times before the final determination. In *State ex relation of Bushnell v. Gates*, clerk, 22 Wis., 214, a proceeding instituted against a clerk, was continued against his successor, because it was to be regarded as a proceeding against the officer and not against an individual." Indeed, such a rule is essential to the administration of justice, in view of the frequent changes in office.

The change in the incumbents of office pending the suit, does not abate the suit, and make it necessary to begin *de novo*, if the successors are charged with the same precise duties. *Sutter v. City of Madison*, 15 Wis., 37. In the case of *Lindsey v. Auditor*, 3 Bush. (Ky.), 235, the auditor resigned and his successor was qualified. This, say the court, presented no defense in bar or abatement. The induction of the new order should have been suggested, and the suit should have progressed against him. See also 18 B. Monroe, 13; *Madox v. Grayham & Knox*, 2 Met. Ky., 71; *Clark v. McKenzie*, 8 Bush. Ky., 531. In such cases, whether

---

Syllabus and brief for appellant.

---

as plaintiff or defendant, the officer represents the public interest.

It was not error therefore to permit Beauchamp, the successor of Howard to prosecute the suit to final decree.

We see no error in the decree of foreclosure, and it is affirmed.

---

CHRISTIAN NEWELL v. E. L. CRIDER et ux.

1. PRACTICE—CHANCERY—BILL TO SET ASIDE A CONVEYANCE. — Crider conveyed to Norton a tract of land for \$400, on credit. While so indebted, Norton purchased a tract of land from Newell, on credit also, and conveyed a portion of it to Crider, in payment of the \$400. Newell enforced the vendor's lien against all the land sold to Norton, had it sold and became the purchaser, then filed a bill against Crider to set aside the deed from Norton to Crider. There was nothing to show to Crider, or give notice that the purchase money to Newell was unpaid, the deed was in the ordinary form, acknowledging the receipt of the purchase money. *Held*, that Crider was a *bona fide* purchaser.

APPEAL from the Chancery Court of Lincoln County: Hon. E. G. PRYTON, Chancellor.

The facts in this case will be found sufficiently stated in the opinion of the court.

*Chisman & Thompson*, for appellants:

"Taking property in payment of a pre-existing debt does not make the buyer a purchaser for valuable consideration, in the eye of the law, as against one holding a prior equity." S. & M. Miss. Ch. Rep., p. 45.

"A purchaser who takes a conveyance in payment of a pre-existing debt from the grantee is not entitled to protection against the prior creditors of the grantor, for there the conveyance places him in no worse situation than he was before, and the creditors would have the stronger equity. The purchaser must have advanced a new consideration upon the faith of the estate conveyed, or have relinquished some security for a debt previously due him."

---

Brief for appellees.

---

Agr. Bk. v. Dorsey, Freeman Ch., 338; Dickerson v. Tillinghast, 4 Paige, Ch., 215; Governier v. Fritz, 4 Paige Ch., 347; Coddington v. Bay, 20 John., 637; Upshaw v. Hargrove, 6 S. & M., 286; Boon v. Barnes, 28 Miss., 186.

If a party take specific property in satisfaction and discharge of a pre-existing debt, *which is thereby extinguished*, he is a *bona fide* purchaser. Love v. Taylor, 26 Miss., 567; 16 Peters, 1, 16. The conveyance of the lands to the Criders by Norton, under the circumstances of this case was a fraud on them, and no payment. Their debt is still good. Hoopes & Bogart, v. Newman, 2 S. & M., 71; Swartwout v. Payne, 19 Johnson, 294; Markle v. Hatfield, 2 Johnson's, 455; Blake & Willis v. Morrison, 33 Miss., 123; Perkins v. Swank, 43 Miss., 349. Wilful ignorance is not to be distinguished in its equitable consequences from actual knowledge. Kerr on Law of Frauds and Mistakes, 237; Jones v. Smith, 1 Ha., 55; 1 Ohio, 244; Owen v. Homan, 4 H. L., 997, 1035; Pringle v. Phillips, 5 Sandf., 157.

*T. J. & F. A. R. Wharton*, for appellees:

It will be perceived that there is a total failure of the proof adduced by the appellants to establish the fact that Mrs. Crider or her husband, the appellees, had any notice whatever, either actual or constructive at or before her purchase or the payment of the money, of any equitable lien or claim, or pretense of such lien or claim held by the appellant, Mrs. Newell, as vendor. On the contrary, the appellees have conclusively established the negative of the proposition, viz., that she had no such notice nor any possible information which should have put her upon inquiry as to the existence of any such claim or lien.

The case falls within none of the rules laid down by this court in reference to the notice which will bring subsequent purchasers — such as that a vendee is bound to take notice of all incumbrances which are recited in the title deeds of his vendor, and under which he derives title, and he cannot insist on want of notice of such recitals, by denying that he read them, as in

---

Brief for appellees.

---

Wailes v. Cooper, 2 Cush., 208 ; Gordon v. Sizer, 10 Geo., 805. And so when a purchaser cannot make out his title but by a deed which leads to another fact, he is chargeable with notice of the fact as in 2 Geo. 324.

There were no recitals in deeds, no proceedings of court of record, no admissions or declarations of any party which affect Mrs. Crider with such notice.

Your Honor may apply to this case the rules laid down in Parker v. Foy, 43 Miss., 260, a case going to the fullest extent the doctrine was ever carried in England or the United States, and in which the law was thus declared: "Whatever is sufficient to *excite attention*, or put a party on inquiry, is notice of everything to which such attention or inquiry might naturally lead."

There is not a scintilla of evidence adduced by the appellants to support the allegation of the bill, that Mrs. Crider had any notice of nonpayment of the purchase money by her vendor, Norton, to his vendor, Mrs. Newell, whilst it is emphatically denied in the answer and the depositions of Norton and the appellees. Norton states distinctly, that it was quite impossible that she should have had any such notice; that the day after he bought from Mrs. Newell he sold and conveyed to Mrs. Crider, and there is nothing in the deed from Mrs. Newell to Norton which could have excited inquiry with Mrs. Crider if she had seen it, because on its face it avers payment of the purchase money.

Again, the fact that Mrs. Crider paid the full market value of the land, paid it *bona fide*, rebuts any suspicion of notice of existence of the money lien. It is equally rebutted by the fact, that Miller, brother of Mrs. Crider, let his half of the land, held with Mrs. Crider, go in the same way to Norton, so that every fact and circumstance conclusively establishing the ignorance of Mrs. Crider of any lien of Mrs. Newell, and there is a total absence of anything held in Parker v. Foy to be sufficient to put upon inquiry. Every requirement of that case is fully met in this.



---

Opinion of the court.

---

Remarking upon purchaser having notice before execution of deed or payment of purchase money, the court say: "In order to his protection the purchase must be complete before notice of the prior equity. To make it complete, there must be, on the one side an execution of the conveyance, and on the other, a payment of the whole of the purchase money, and the protection will be denied if the notice be given before the transaction is complete in either particular."

The testimony of Norton states most positively that, not only was the trade with Mrs. Crider made and consummated, but the money paid and deed made to her the next day after his purchase from Mrs. Newell. Mrs. Crider, in her deposition, swears that she had not a suspicion when she bought, paid the money and took a deed from Norton, that the latter had not fully paid Mrs. Newell his purchase money.

We have never known a bill brought to enforce a money lien against a sub-vendor, on the ground that he had notice his vendor had not paid his purchase money, which was so wholly unsupported by law or evidence. We ask that the decree be affirmed and the bill dismissed.

TARBELL, J., delivered the opinion of the court:

Mrs. Crider sold and conveyed to A. J. Norton a tract of land, for which the latter agreed to pay \$400. It does not appear whether a vendor's lien was reserved in terms, or other security taken, nor even whether notes were executed by Norton; but simply that he owed Mrs. Crider \$400 for land sold and conveyed to him by her and her husband. While so indebted to Mrs. Crider, Norton opened negotiations with Mrs. Newell, for the purchase of a tract of land of her. Pending this negotiation, Norton informed the Criders of its pendency, and that, when consummated, he would convey to Mrs. Crider, in payment of his indebtedness to her, a specified number of acres, out of the tract for which he was thus negotiating. Accordingly, having received a

---

Opinion of the court.

---

deed from Mrs. Newell, he proceeded with it to the Criders, when, as he had promised, he executed a conveyance to Mrs. Crider of a parcel of the tract conveyed to him by Mrs. Newell. There was nothing on the face of the deed from Mrs. Newell to Norton, reciting the reservation of the vendor's lien; nor was there anything to show that the purchase money was in whole or part unpaid; but, on the contrary, the deed was in the usual form, acknowledging receipt of consideration. Whether or not the purchase by Norton of Mrs. Newell was on a credit, did not appear in the deed, nor by any writing; nor, as far as the record discloses, was the matter spoken of or mentioned by any one from first to last. In fact, however, Norton purchased of Mrs. Newell on a credit. Neglecting to pay her, she proceeded to enforce her vendor's lien by a suit in chancery, wherein she obtained a decree for the sale of the entire tract conveyed to him. To this proceeding, the Criders were not parties. The land having been sold under the decree, and Mrs. Newell becoming the purchaser, she instituted this proceeding to set aside the deed from Norton to Mrs. Crider, as a cloud upon her title. The chancellor decreed adversely to Mrs. Newell, whereupon she appealed to this court. The final decree is the only error assigned, and is based on the sole argument that Mrs. Crider is not a *bona fide* purchaser from Norton.

The facts have been substantially stated. They may be recapitulated. Whether Norton purchased of Mrs. Newell on a credit was not disclosed by the deed from her to him, and exhibited to both the Criders; nor by any writing; nor by any conversation, or remark, question, rumor or observation of any sort whatever. To a question why he did not inquire as to the fact, Mr. Crider said it was, or he considered it none of his business. It is manifest, from the record, that there was a very searching investigation in the court below upon this branch of the case, yet, as far as can be seen, without discovering or developing any grounds for putting the Criders upon inquiry even, while actual knowl-

---

Opinion of the court.

---

edge is emphatically negated. If, then, Mrs. Crider is not a *bona fide* holder of the title from Norton, as against the equity of Mrs. Newell, it must be upon the fact, which is most earnestly pressed by counsel, that the conveyance from Norton to Mrs. Crider was in consideration of a pre-existing debt which, it is testified, was canceled by the Criders upon receipt of the deed from Norton, and in consideration thereof. The testimony is, that the debt to Mrs. Crider was "canceled and extinguished."

The argument is earnestly pressed by counsel, but the question involved is understood to be definitely settled in this state, in accordance with the decree now sought to be reversed. *Love v. Taylor*, 26 Miss., 567; *Perkins v. Swank*, 43 ib., 349; *Hinds et al. v. Pugh*, 48 ib., 275.

The testimony brings the case at bar fully within the doctrine of the cases cited. In consideration of the conveyance from Norton to Mrs. Crider, the indebtedness of the former to the latter was "canceled and extinguished." This constitutes a new and valuable consideration, and, under the facts of this case, creates Mrs. Crider a *bona fide* purchaser according to the cases cited. *Perkins v. Swank* was not intended to, nor does it in any respect modify the rule declared in *Love v. Taylor*. So far from this, the former follows the latter literally.

In *Hinds v. Pugh*, it is said: "And all the authorities agree, that if the creditor relinquish a pre-existing security for his debt, that will constitute him a purchaser for a valuable consideration, and, if that be so of the security merely, *a multo fortiori*, must the relinquishment of the debt itself have that effect?" Thus the rule in the case stated is clearly defined in this state. *Love v. Taylor* is based on *Swift v. Tyson*, 16 Peters, 1, and no objections to the reasoning in the former are regarded as well founded. This will doubtless finally settle the question involved, so far as our own state is concerned.

The question now disposed of was not presented in *Rowan & Harris v. Adams et al.*, 1 S. & M. Ch. R., 45; nor did *Ag. Bank*

---

Syllabus.

---

v. Dorsey, Tremain Ch. R., 338, turn upon this point, as will be seen by reference to the conclusion of the opinion of the chancellor, on page 344. The cases of Coddington v. Bay, 20 Johns. R., 637, and of Dickerson v. Tillinghast, 4 Paige Ch. R., 215, cited by counsel, are clearly distinguishable from the one at bar. Those cases state merely the now well recognized distinction between the cancellation and extinguishment of a prior debt, and, on the other hand, of its payment, which operates as a security only. See, also, Gouverneur v. Titus, 6 Paige, 347. It is unnecessary to point out the dissimilarity between this case and the cases of Upshaw v. Hargrove, 6 S. & M., 286; Boon v. Barnes, 23 Miss., 136; Dunlap v. Burnett, 5 S. & M., 702, to which reference is made, as the distinction will readily appear upon inspection.

Decree affirmed.

---

WILLIAM and MARY HOPTON v. JAMES T. SWAN.

1. **PRACTICE — PROCESS — OFFICERS — POWER OF COURT OVER THEM.**—The general rule is, that it is inherent power in a court to control its process and officers. When justice demands, it may quash the process or set aside a sale for fraud, made by its officer under a legal process. Nilson v. Brown, 23 Mo., 19. But this power is limited to the return term of the writ. After that the remedy is in equity.
2. **SAME — SAME — PROPER GROUNDS FOR COURT OF LAW TO SET ASIDE A SALE.**—Any irregularity of the officer making the sale, or of the plaintiff, or of either party, whereby competition was prevented at the sale, or gross inadequacy of price in connection with other circumstances, will be grounds for setting aside the sale. Rorer on Jud. Sales, § 855.
3. **SAME — SAME — HOW SALES SET ASIDE BY A COURT OF LAW.**—The party injured can have relief by a summary application to the court under whose authority the officer acts, or through the medium of a court of equity. A motion, to the court from which the process issued, to quash the execution and set aside the sale to the plaintiff, will be sustained in proper cases. Upon the hearing of such motions the court can admit evidence, or if demanded, a jury trial may be had; if not the party will be considered as having waived it.

## Brief for appellants.

ERROR to the Circuit Court of Lincoln County. Hon. JAS. M. SMILEY, Judge.

The appellee, James T. Swan, filed a petition in the circuit court of Lincoln county, to enforce a mechanic's lien upon the property of appellants. At the trial of the petition, appellee obtained a judgment of seventy-five dollars against appellants. *Venditioni exponas* issued and sale was made by the sheriff of the buildings and three hundred and twenty acres of land belonging to appellants. Said property was worth at the time of the sale about \$8,000. At the sale the appellee plaintiff in execution became the purchaser for \$30.00.

Appellants had no actual knowledge of the sale and were garnisheed at the time by a creditor of appellee, and had given notice to the sheriff that they were ready and willing to pay whoever was entitled to receive the amount of the judgment against them.

At the return term, appellants moved to quash the execution and set aside the sale. This motion was overruled, and appellants appeal to this court and assign as error the overruling of the motion to quash the execution and set aside the sale.

*Chrisman & Thompson*, for appellants, contended that the circuit court has jurisdiction to grant relief, and cited in support of this, 18 Wend., 611; 12 Wend., 253; 2 Wend., 260; 16 Wend., 4; 10 S. & M., 58. The plaintiff in execution being the purchaser at the sale, is not an innocent purchaser. *Parker v. Foy et al.*, 43 Miss., 266.

The quashal of the execution *ipso facto*, vacates the sale. 1 Cowen, 640; Bacon's Abrdgt., title Error, vol. 3, p. 290.

The sale of all the land in one lot was violative of the organic law, and makes the sale absolutely void. Art. 12, sec. 18 of Const.

The judgment was paid at the time of the sale, and the officer was obliged to pay over the money to the judgment creditor. 15 Johns., 446; 7 Ills., 425.

There was gross abuse of the final process, and it is inequitable

---

Opinion of the court.

---

and unconscientious. Sheriff's sale will be set aside for gross inadequacy of price. 1 Johns., Ch. R., 502; 6 Ills., 411; 4 Ills., 118; 18 Wend., 611.

*Hiram Cassedy, Jr.*, for appellees, contended that the circuit court had no power to quash a *venditioni exponas* or to set aside the sale after the sheriff had executed a deed to the purchaser, and cited Code of 1871, § 854. If there is fraud in a sale made by a sheriff under execution, such sale cannot be set aside by a court of law. The remedy, if any, is in equity.

A purchaser at a sheriff's sale who pays his bid, is not affected by a subsequent reversal of the judgment under which the sale was made. *Natches Ins. Co. v. Helm*, 13 S. & M., 182. Nor will the quashal of an execution vitiate a sale previously made under it. So a sale made under a voidable execution is good. *Doe v. Snyder*, 3 How., 66; *Doe ex dem. Starke v. Gildart, et al.*, 4 How., 267.

SIMRALL, J., delivered the opinion of the court.

This record discloses a most oppressive and fraudulent use and abuse of the final process of the court by Swan, the judgment creditor.

Swan had recovered a judgment against Hopson and wife for seventy-five dollars, which condemned a certain building, being a dwelling house, and the premises upon which it was erected, containing 320 acres, to sale. The gravamen of the suit was a mechanic's lien. A special execution pursuant to the judgment was issued, under which the sheriff sold the entire 320 acres of land. Whether it was offered for sale in a body or in subdivisions of the section, does not clearly appear. Swan, the plaintiff in the writ, urged the sale to be made, and bought in the property for thirty dollars. It was shown at the hearing of the motion to quash the execution and set aside the sale, that Hopson and wife, before the sale, paid to the sheriff at one time \$119, and at another, \$11. It was also proved that Hopson and wife had been

---

Opinion of the court.

---

garnisheed as the debtors of Swan, by D. W. Hurst, and upon their answer of an indebtedness of \$75 to Swan, had been condemned to pay it to Hurst. It was further shown, that there was a pending dispute and negotiation between the parties, as to the rights of Swan and Hurst against Hopkins and wife, and that the latter were willing and proposed to pay Swan any balance, if he would indemnify against Hurst. That action under the judgment had been suspended by reason of these unsettled and conflicting claims; and that Swan, without notice to Hopson and wife, and in their absence, induced the sheriff to sell the entire premises of 320 acres, with a water tank and fixtures to supply water to the locomotives of the N. O., J. & G. N. R. R., Co., with a grist mill and dwelling house thereon worth, in the opinion of witnesses, \$8,000. It would be shocking to conscience if Swan should, in such circumstances, be permitted to hold and enjoy this large and valuable property, because there was no power in the circuit court to control the execution of its own process.

That was the ground upon which the circuit court overruled the motion, as recited in its judgment.

The general rule is, that it is inherent power in a court to control and regulate its process. When justice and fair honest dealing demand, it may quash the process itself, or may set aside a sale under it. In *Drane & Smelser v. Henderson*, 15 Ala. Rep., 423, it is declared that a court of law is fully competent to control the acts of its officers and set aside sales made by them under legal process, if there has been fraud in the sale, etc. *Nilson v. Brown*, 23 Mo., 19, affirms the same principle, but limits (as we think properly), the right of the court of law to set aside proceedings under the writ to the return term. After that the aggrieved party should more appropriately seek redress in a court of chancery.

The authorities lay down the doctrine to the extent that any irregularity of the officer making the sale, or of the plaintiff, or those who represent him, or of either party, whereby competition

---

Opinion of the court.

---

was prevented at the sale, *Jones v. R. R. Co.*, 32 N. H., 544, or for such gross inadequacy of price as to shock the moral sense, especially in connection with other circumstances of unfairness and hardship, *Rorer on Ind. Sales*, p. 290, § 855, will be ground to set aside the sale. See also *McLain County Bank v. Flagg*, 31 Ill., 295; *Cummings' Appeal*, 23 Penn. St., 509.

In *Saul v. Dawson*, 3 Wils., 49, the plaintiff in ejectment recovered five-eighths of a cottage, under the writ of *habere facias possessionem*; the sheriff turned the tenant out of the possession of the whole. But the court made a rule upon the sheriff and the lessor of plaintiff, to restore three-eighths to the tenant.

In *Ryerson v. Nicholson*, 2 Yates Rep., 516, the sale of lands under a *fieri facias*, was set aside, because the sheriff sold several distinct parcels together. The power of the court was considered, and the right to interfere in this summary way, was admitted. So also are the cases of *Friedly v. Scheetz*, 9 S. & R., 162, and *Rowley v. Brown*, 1 Binney R., 61.

In considering the power to give redress upon motion, in *Jackson v. Roberts*, 7 Wend. Rep., 88, the court say, "the party injured can have relief by a summary application to the court, under whose authority the officer acts, or through the medium of a court of equity. Instances of such relief by motion, are *Ontario Bank v. Lansing*, 2 Wend., 260, and *Groff v. Jones*, 6 Wend., 522; *Arnott & Copper v. Nicholls*, 1 Harr. & John., 471; *Nesbit v. Dallam*, 7 Gill. & John., 512. In Kentucky there was a statute authorizing the court, on motion, to set aside sale under process, for sundry causes, named in the statute; the court of appeals of that state, has not construed the "act," as conferring a jurisdiction in the special circumstances, and as impliedly inhibiting motions for other good causes, not embraced in it; but have set aside sales for various other reasons, as in *Carlile v. Carlile*, 7 J. J. Marshall, 625, where the sheriff announced a greater amount due than was really due by the execution; and *Stockton v. Owings*, Litt. Select Cases, 256, for inadequacy of price, and other circumstances.



---

Opinion of the court.

---

Our books abound with cases upon motions to quash executions and forthcoming bonds, at the return term. In *Munn v. Nichols*, 1 S. & M., 259, it was not questioned that a motion could be made upon proper notice to set aside a return of satisfaction, and award another execution. So, upon notice of the motion, an execution may be entered satisfied. *Planters' Bank v. Spencer*, 3 S. & M., 313; *Haley v. Williams*, 8 S. & M., 487.

In *Flourno v. Smith*, 3 How., 64, the power of the court upon motion to set aside a sale, was denied, because such inquiries involve an examination of facts, proved to the court; violates that provision of the constitution guarantying trial by jury. This judgment is not placed upon any special or exceptional ground; but upon the incompetency of a court of law to entertain the motion, because the facts can only be found by a jury.

In the later case of *Lewis v. Garrett*, 5 How., 454-5-6-7, the same objection was pressed, where a motion under the statute had been made against the sheriff and his sureties for a failure to return an execution. The argument was especially pressed in behalf of the sureties, that a heavy judgment could not be rendered thus summarily against them, for a breach of the bond without trial by jury, to find the fact that a breach had been committed, and to assess the damages. But the court held that at common law, the officer was amenable to the court for his acts done under its process, and that the jury trial was only assured according to its use, at the common law; and, moreover, the parties not having claimed it in the circuit court were to be considered as having waived it. And on that point referred to *Bank of Columbia v. Okely*, 4 Wheat., 240, which brought into review the 14th section of the charter of the bank; which was in effect, that for default made in the payment of notes, bills or bonds, negotiable at the bank; upon notice given, the note or bond might be filed with the clerk of a certain court with the notices of demand of payment, etc., with application for a writ of *capias ad respondendum, fieri facias*, \* \* \* on which the debt and costs might be levied,

---

Syllabus.

---

on a motion to quash the *fi. fa.* This section of the charter was sustained, upon the ground that the debtors had *waived* their *right* to the trial by jury.

In the case of *Planters' Bank v. Spencer*, 3 S. & M., 314 (already cited), the same objection was made. But to that the court responded: "A court has always power to prevent an abuse of process. And there are many questions which may be decided by the court in a summary way, and in such cases, it usually has power to hear evidence on which to found its judgment."

The right of the court to hear evidence, in support of motions, has been so often recognized in practice, that there has been a departure from the reasoning and rule laid down in 3 How., fully and authoritatively established. If demanded in a proper case, the facts would be referred to a jury. But unless asked for, the party will be considered as having waived.

We feel constrained by authority to affirm that the power does exist in the circuit court, at the return term of its process, to correct any oppressive and unjust use or abuse of it, to the prejudice of the parties thereto, and to set aside the sale rule to the plaintiff.

We think that in this case the plaintiff in error was entitled to the redress he sought.

The judgment of the circuit court is reversed, and judgment here, setting aside the proceedings of the officer under the execution.

---

HOMER PULLIAM et al. v. A. H. TAYLOR.

1. CHANCERY COURT — JURISDICTION — PRACTICE — BILL TO REMOVE CLOUD ON TITLE. — The statute of frauds denounces absolute nullity, upon every gift, grant or conveyance, made with intent to hinder, delay or defraud creditors. In so far as the creditor is concerned, it is as though it had never been made, and the title was still in the debtor — the fraudulent grantor. The jurisdiction of a court of equity is ample, either before or

50	551
74	152

---

Brief for appellants.

---

after sale, to set aside a fraudulent conveyance. It is by virtue of the "lien" that the creditor may go into a court of equity to displace a fraudulent conveyance, even before levy.

APPEAL from the Chancery Court of Chickasaw County (1st district). Hon. W. D. FRAZEE, Chancellor.

Complainant filed his bill in the chancery court of Chickasaw county, seeking to vacate and set aside a conveyance of land, alleged to have been fraudulently made. To which bill a demurrer was interposed, and the court overruled the demurrer, and the defendants bring the case to this court by appeal, and assign for error the overruling of the demurrer.

A. Y. Harper, for appellants:

This bill seeks to vacate and set aside a conveyance of lands alleged to be fraudulent, before a sale is made under execution; all bills filed before such sales are in aid of executions at law, and stand on the same footing as bills to subject equitable assets in respect to jurisdiction, that is, they must show that the legal remedy has been completely exhausted, before the aid of a court of equity can be invoked.

The complainant, in this case, could have levied an execution under the judgment, and have sold the title and interest of the judgment debtor, and then have filed his bill to vacate and set aside the conveyance. It must appear from the bill that an execution was issued within a year and a day, and returned *nulla bona*.

This bill does not charge that an execution was returned *on the return day*. It shows that two executions were issued, but if the last issued after the first and before return day, it is without authority of law, and a court of chancery will not lend its aid to such an act. The bill must show when the execution issued, and when returned, and the substance of the return. It is deficient in this, and the demurrer is well taken.

If the grantee purchase *bona fide* for a valuable consideration, without knowledge of an improper design, his title will not be affected.

---

Brief for appellee.

---

In all such cases, the creditor is obliged to prove actual fraud in the grantor, and a participation or knowledge of fraud in the grantee, and this must be specifically charged in the bill. In order to protect the purchaser without notice, he must deny notice, fully and particularly, either by plea or answer.

If the defendants are fair purchasers, without notice, and can bring themselves within the rules by which that question is tested, they are not affected, even if fraud could be established against their immediate grantor. Therefore, we contend that the demurrer is good on this point.

*Houston & Reynold*, for appellee.

The bill shows a recovery of the judgment, the issuance of a *fi. fa.* within a year and a day, which was regularly returned "no property found;" the issuance of a second *fi. fa.*, and its levy upon certain lands as the property of defendant, Homer V. Pulliam; the conveyance of the lands levied upon by Homer V. Pulliam to his wife, and that the conveyance was executed without any consideration valuable in law, and that it was not executed in good faith, but was made for the purpose and with the intent to hinder, delay and defraud the creditors of Homer V. Pulliam.

Homer V. Pulliam and Martha B. Pulliam, his wife, demurred to the bill. The demurrer was overruled, and an appeal presented to this court.

1. Cause of demurrer. That the bill does not state the residence of the parties, nor does it make Gardner, trustee, a party.

The bill does state residence of all the parties, and Gardner, the trustee, is made a party, "and M. T. Gardner by fit and proper process be made a party defendant to this bill."

2. That the bill does not show that the defendant has no personality, or that a writ of execution was issued, and only returned on the return day thereof, or that the land levied upon was the property of H. V. Pulliam.

It is averred that an execution issued within a year and a day, and that it was *regularly* returned "*nulla bonu*," and that the lands levied upon were the property of Homer V. Pulliam.

---

Opinion of the court.

---

This is not a bill to subject equitable assets, but to aid an execution at law, and it is only necessary to aver the judgment execution, and that the property has been fraudulently conveyed. *Vasser v. Henderson*, 40 Miss., 519; 1 Am. Lead. Cases, 77, 78, 792 Ed.; *Planters' Bank v. Walker*, 7 Ala., 926; *Dargan v. Waring*, 11 Ala., 988.

3. This cause of demurrer involves the same principle as the second.

4. Because the bill does not offer to include the claims of other creditors. Nor should it. If the judgment is a lien upon the property, then the creditor is entitled to priority. If his judgment was no lien, then he acquired it by the levy of his execution and the filing of his bill to aid his execution. 1 Am. Lead. Cases, 54, 77, 78, 79; notes to *Salmon v. Bennett* and *Saxon v. Wheaton*.

5. Because the bill does not sufficiently aver the fraud or knowledge of the fraud on the part of the wife and the trustee. It does sufficiently aver fraud and the knowledge of it. It states "that the conveyance was made without any consideration, and not in good faith, and was made for the purposes and with the intent to hinder, delay and defraud creditors."

This case involves exactly the same questions as are presented in the case of *Robert Pulliam et al. v. A. H. Taylor and A. L. Premtt*, and we refer to our brief in that case. It is agreed that the two may be submitted together.

SIMRALL, J., delivered the opinion of the court.

A. H. Taylor recovered a judgment at law, against Homer Pulliam, for several thousand dollars. One execution was returned *nulla bona*. Afterwards another was issued, which was levied by the sheriff, on the several parcels of land mentioned in the bill. Taylor alleges, that some time prior to the recovery of the judgment, Pulliam conveyed the lands to his wife, without any valuable consideration therefor, and with intent to hinder, delay and defraud the complainant and others, his creditors.

---

Opinion of the court.

---

A demurrer to the bill was overruled, and from that order of the chancery court this appeal was taken.

The formal exceptions taken by the demurrer, to the bill, are not well founded. The residence of the parties is stated.

It has been long settled in this state, that a creditor cannot obtain the aid of a court of equity to subject equitable assets, such as cannot be taken on execution, until he has reduced his demand to judgment, and pursued his debtor to insolvency at law, by a return of *nulla bona*, upon an execution. *Farned v. Harris et al.*, 11 S. & M., 366; *Brown v. Bank of Mississippi*, 31 Miss. Rep., 458. But that doctrine has no application (as insisted by counsel) to this case.

The statute of frauds denounces absolute nullity, upon every gift, grant, conveyance \* \* made \* \* with intent to hinder, delay or defraud creditors. "In so far as the judgment creditor is concerned it is as though the conveyance had never been made, and the title was still in the debtor, the fraudulent grantor." *Carlisle v. Tindall*, 49 Miss., 234; *Pennington v. Seal*, 49 Miss., 527. Such is the character which the bill ascribes to the conveyance, made by Homer Pulliam to his wife. Notwithstanding that conveyance, the property was open to creditors, and they could reach it as though that deed had never been made. The lien of the judgment was operative upon the land, and the creditor had a right to satisfaction of his judgment by a sale of it, under execution. The land, which the creditor is thus pursuing, is not equitable assets, within the meaning of the authorities cited, but is legal assets, accessible to the sheriff, under legal process.

The object sought by the bill is to disincumber the land, the title to which is obscured, and made apparently doubtful, by the conveyance of Pulliam to his wife, so that a good and reliable title may be offered to purchasers, and the creditor may obtain the worth of the land on a sale. The jurisdiction of a court of equity is ample either before or after sale, to set aside a fraudu-

---

Syllabus.

---

lent sale. *Gallman v. Perrie*, 47 Miss Rep., 140; *Vasser v. Henderson*, 40 Miss., 520. *Hizheim v. Drane*, 10 S. & M., 556; *Berryman v. Sullivan*, 13 S. & M., 65; *Fowler v. McCartney*, 27 Miss., 509; *Snodgrass v. Andrews*, 30 Miss., 472.

It is by virtue of the "lien," that the creditor may go into a court of equity to displace a fraudulent conveyance, even before levy. The two last cited cases—and *Brinkerhoff v. Brown*, 4 John. Ch. Rep., 677.

There is no error in overruling the demurrer to the bill.

The decree is affirmed.

---

W. F. ARBUCKLE v. EBEN NELMS.

1. LIEN—MORTGAGE—LANDLORD AND TENANT—ACT OF 17TH APRIL, 1873.—Neither at common law, nor under the statutes, prior to the act of 17th April, 1873, had the landlord a lien upon the agricultural products or the chattels on the premises for his rent.
2. LANDLORD AND TENANT—LIEN OF ACT OF 17TH APRIL, 1873.—This act confers a lien on the landlord, so as to place his rent in kind beyond the power of the tenant for any debt contracted by him. It was designed to give a security on the crop itself, so that it could not be incumbered to the prejudice of the interest of the landlord.
3. SAME—SAME.—A lien upon a crop, created by the act of April 17, 1873, although declared to be a "first lien," is subordinate and inferior to a mortgage or conveyance in trust of the crop previously given. This lien attaches for the benefit of those who cultivate the crop, and are entitled to a share thereof, and also for the landlord's rent, from the date of the passage of the act, as between the parties immediately interested. But not so as to impair any specific incumbrance or lien placed upon the crop before the act went into effect.
4. SAME—CASE IN JUDGMENT.—N. leased to K., on the first of January, 1873, thirty acres of land, for that year, the rent to be paid in cotton. On the 31st of May, 1873, K. executed a mortgage on his crop to A., for supplies, etc. *Held*, that as the mortgage was not executed until after the passage of the act of 17th April, 1873, it was subordinate to the lien of the landlord created by the act.

---

Brief for plaintiff.

---

ERROR to the Circuit Court of De Soto County. Hon. E. S. FISHER, Judge.

The facts of the case sufficiently appear in the opinion of the court.

*Harris & George*, for plaintiff in error :

The writer of this has stated to the court, in a note appended to a certificate for a re-argument in another case, that it was his conviction that the act of 1873 secured to the landlord a prior lien on the crop when his rent is payable in money, even ; but as that act has never yet received a construction from the court, he asks that the court will give his client the benefit of a contrary construction, should such be deemed right.

In this case there was no contract for any part of the crop raised specifically, but the landlord admitted in his testimony that, if any three bales of cotton, of the requisite quality and weight, were tendered he would be content, though they were not raised on the demised premises.

But the points on which we mainly rely, are these :

1. The contract of renting was made before the passage of the act giving the lien to the landlord ; and there is nothing in it to show that the legislature intended to give the act a retrospective operation. It will not be so construed unless the words used imperatively demand it, or the act can have no other operation. *Brown v. Wilcox*, 14 S. & M., 127 ; *Easten v. Van Dorn*, Walk., 214 ; *Gayden v. Bates*, ib., 209 ; *Hooker v. Hooker*, 10 S. & M., 599 ; *Garrett v. Beaumont*, 2 C., 377 ; *Carson v. Carson*, 40 Miss., 349.

2. To give the statute the effect of operating on the prior contract of leasing, would make it unconstitutional ; for it would be adding to the contract a very important term not embraced in it. When the contract of leasing was made, the lessee came under a personal obligation only for the payment of the rent, and he contracted also for a free and unrestricted ownership of the productions of the soil. This act deprives him of this unrestricted



---

Opinion of the court.

---

ownership and power over the crop, and incumbers it with a lien not assented to by him.

*White & Chalmers*, for defendant in error, contended :

1. That Nelms by the terms of his contract of rent had an "interest or share" in the crops of his tenant to the extent of his three bales of cotton, and hence under the terms of the act of April 17, 1873, this "share or interest" could not be incumbered by the tenant to the prejudice of Nelms. And the mortgage being executed by Kidd to Arbuckle a month after the passage of the act of April 17, 1873, is subordinate to the lien created by that act.

SIMRALL, J., delivered the opinion of the court.

Arbuckle, the plaintiff in error, asserts a claim to the three bales of cotton in question, under a mortgage made by Kidd, the 31st of May, 1873, which was filed for record the 2d of June, 1873.

Nelms, the plaintiff in the circuit court, claims the cotton as landlord of Kidd, to whom he had leased 30 acres of lands for the year 1873, the rent to be paid in three bales of cotton, of 500 pounds weight each. The cotton in the seed had been delivered by Kidd to the agent of Nelms. After it was ginned and baled, the three bales were seized by Arbuckle under legal process. It is plain that this is the case of the relation between Nelms and Kidd, of landlord and tenant, Kidd being responsible to Arbuckle for the rent. The former having against him the rights and privileges conferred by law to enforce payment.

We have held in several cases that neither at common law, nor under our statute, does the landlord have a lien upon the agricultural products, or the chattels on the premises for his rent. But it is urged that Nelms has the benefit of the lien provided in the first section of the act of April 17, 1873, p. 79, pamphlet. If so, his right is paramount to that of Arbuckle, under his mortgage of subsequent date.

The last clause of the first section of this act, though obscure

---

Opinion of the court.

---

in the language, confers a lien on the landlord, so as to place his rent in kind beyond the power of the tenant for any debt contracted or suffered by him. Apart from this statute the tenant is sole owner of the products of the soil, and could sell absolutely, or mortgage in good faith, so as to give a preference over the landlord. This statute was designed to give a security in the crop itself, so that it could not be incumbered to the prejudice of the "share or interest" of the landlord in it for rent. The landlord has a statutory lien, raised by law to assure to him so much of the crop of cotton, or other product, raised on the demised premises, as has been reserved for rent. This is a limitation on the power of the tenant to incumber the crop. The act of 1873, in connection with that of the 5th of April, 1872, of which it is amendatory, makes it a "first lien."

But it has been pressed by the counsel for Arbuckle in argument, that inasmuch as the lease was made to Kidd the first of the year 1873, he can take no benefit of the lien provided by the statute subsequently passed. We have held at this term that a lien upon a crop raised by the statute of 1872, April 5th, although declared to be a "first lien," was inferior and subordinate to a mortgage or conveyance in trust of the crop, previously given. If the mortgage of Arbuckle was prior to the 17th of April, 1873, (the date of the statute) it would be paramount to Nelms' claim. Must the lien attach at the time the contract of lease was made, or can it take effect where the lease was made before the law was passed?

It would be *ultra vires* of the legislature to interfere with the contract prejudicially, of Nelms and Kidd, made in January, 1873. That contract was, that Nelms should receive, and Kidd should pay, three bales of cotton for the use of the land. The statute does not increase the obligation of Kidd. But in effect, enacts, that hereafter it shall not be lawful for tenants to make contracts, with other persons, touching the crop, which will cripple or hinder the tenant from complying with his promise to his

---

Opinion of the court.

---

landlord. In effect, it declares that he shall not, for his debts, incumber the crop, so as to put it out of his power to pay his rent.

It is a limitation put upon the power of disposition which the tenant has over the crop. Arbuckle had knowledge, or (is assumed to have had) at the time he took his mortgage, of this statute. It went into effect a month or more before he acquired his security. He has, therefore, no right or ground to complain of the restrictions of that law for the benefit of the landlord. That statute displaced or affected no specific right which he had.

We are of opinion that the privileges of the statute attached for the benefit of those who cultivate the crops, and are entitled to a share thereof; and also for the landlord's rent, from the date of the passage of the act, as between the parties immediately interested.

But not so as to impair any specific incumbrance or lien placed upon the crop, before the act went into effect. The scheme and purpose of the first section, where land owner and cultivators are interested in the crop, in shares, and where the landlord has reserved his rent in kind, is to hold the entire crop, chargeable with a division, in the first case, into the shares according to agreement. And in the other, with a subtraction and separation from the whole of the part due the landlord for rent. And these several individual rights and interests shall not be affected or injured by the debts, contracts, or incumbrances of each other.

To give immediate operation to the statute would not impair any right Arbuckle had against Kerr, on the 17th of April, 1873. It would seem from the recital in the mortgage, that Kerr was already indebted on an old balance, and would be further indebted for supplies during the year. As to the past indebtedness, if reduced to judgment, a seizure of the tenant's effects, under execution, could not be made without paying one year's rent; that is the whole demand which Nelms had against his tenant.

We think the circuit court reached a right result.

The judgment is affirmed.

---

Syllabus.

---

## E. G. BETTS, trustee, etc., v. DAVID RATLIFF.

1. **MORTGAGES—CROPS.**—Whether or not a mortgage could be executed at common law, on a crop before it was planted, it is competent for the legislature to authorize it. This was done by act of February, 18, 1867.
2. **SAME—ACT OF FEBRUARY, 18, 1867.**—By sec. 7 of act of February 18, 1867, crops of cotton, corn or other agricultural product, being produced or to be produced within fifteen months, can be conveyed by mortgage or deed in trust. Such mortgage or deed in trust will have priority from its date, whether the crop be then planted or not.
3. **SAME—SAME—LIEN THEREOF.**—The security given by this act attaches to the commodity in advance of the harvest, and the right to apply it to the uses of the mortgage or deed in trust is as of the day of the date and the mortgagee or *cestui que trust* would have priority over any other creditor or incumbrancer, subsequent to the date of such security. It would be *ultra vires* of the legislature to impair a mortgage or deed in trust by subsequent legislation. The act of 1872 does not repeal nor is it repugnant to the act of 1867.
4. **SAME—ACT OF 1872—LIEN THEREOF.**—The first section of this act gives a lien to the laborer or employee for wages, and not the tenant or lessee. The lien takes effect on all agricultural products. If the laborer is to receive moneyed wages there is no product belonging to him upon which the lien can take effect. If the wages be for a part of the crop, then the lien will take effect upon that.
5. **LANDLORD AND TENANT—WHEN IT EXISTS.**—It is well settled that there may be a letting of land from year to year or for one year. Where the relation of landlord and tenant exists, though the rent is to be paid in part of the product, it is equally well settled, that one may cultivate the land of another for the purpose of making a crop, which is to be divided between the landowner and the cultivator, where the parties would be tenants in common of the crop and not landlord and tenant. Whether the contract be of one kind or the other depends on the intention of the parties, to be gathered from all the attending circumstances.
6. **SAME—CASE IN JUDGMENT.**—During the year 1872, W. cultivated land belonging to R., for which he was to pay a certain portion of the crop. R. furnished W. with necessary supplies during the year. In January 1872, W. executed a deed in trust to B. conveying the crop to be grown that year by him, to secure a promissory note. *Held*, that such a contract made W. and R. tenants in common of the crop, but the deed in trust having been executed prior to the passage of the act of April 5, 1872, the lien thereof was superior to the lien created by that statute.

---

Briefs.

---

ERROR to the Circuit Court of Itawamba County. Hon. B. B. BOONE, Judge.

The facts of the case sufficiently appear in the opinion of the court.

*J. B. Harris* with *Harris & George*, for plaintiff in error:

1. We contend, that even under the act of 1872, the relation of employer and employee does not so exist, as to give Ratliff a lien upon the crop, but that, clearly, from the facts, the relation of landlord and tenant exists, in which case Ratliff only had lien for his rent; and as there was no hiring, no wages, and no control over the crop by Ratliff, any lien which he might have for supplies must be an express one; there is no implied lien within the meaning of the statute. See Washburn on Real Property, vol. 1, p. 499; Dockham v. Parker, 9 Greenl., 137; Baily v. Fillebrown, ib., 12; Fry v. Jones, 2 Rawl., 11; Briggs v. Thompson, 9 Penn. St., 338; Munsell v. Carew, 2 Cushing, 50; Ross v. Swaringer, 9 Ired., 481.

2. The deed in trust, under which Betts claims, was executed on the 6th of January, 1872, and the act under which Ratliff pretends to claim was not approved until April 5, 1872, three months after.

*Clayton & Clayton* and *J. A. Brown*, for defendant in error.

Only one question can arise on the agreed statement of facts in this case. That is, where the owner of land employs a laborer to work it on shares, and furnishes the laborer supplies, while cultivating the crop, does the employer have the benefit of the first lien, created by the 10th section of the act of April 5, 1872?

Section 1, act of April 5, 1875, provides a first lien on the agricultural product in favor of laborers who work for wages. Section 10 of same act provides a first lien in favor of employers against their employees, to whom they have furnished supplies. The amendatory act of April 17, 1873, provides a similar lien in favor of laborers, to secure the share of those who work for part

---

Brief for defendant.

---

of the crop, and a similar lien in favor of landlords, to secure the share of the landlord who rents his land for a part of the crop.

The 10th section is, "There shall be a first lien on all agricultural products raised in this state, in favor of every employer as against every laborer employed by him, in the production thereof, for all provisions, clothing, and necessary plantation supplies advanced or furnished, etc." The object of this section is clear. It was intended to apply to such cases as the one at bar. It is common for the owner or lessee of land to employ a laborer to cultivate part of it on shares, and he supplies the laborer while the cultivation is going on. The laborers, as a class, are shingled over with old trust deeds and judgments. The intent of the act is to make the employer secure, in advancing supplies, by a lien on the laborer's share of the product, taking precedence of those incumbrances. The legislature intended to break up a monopoly which sprung up under the agricultural lien law of 1867, to take the supply business in part out of the hands of the merchants, and give it to the managers of farms. It is founded in sound political economy.

The relation of landlord and tenant did not exist between Ratliff and Warren. Where the land owner furnishes the land, and the laborer his work, and they divide the crop, the relation between them may be that of employer and employee, or landlord and tenant, according to the facts of each particular case. In the case at bar, this question of fact was the only one submitted to the jury by the instructions, and their verdict settles the relation between Ratliff and Warren to have been, that of employer and laborer.

The 10th section cannot apply to a case where the laborer works for money wages. In such a case, the laborer has no interest in the crop to which the lien of the employer can attach, and the employer has no use for a lien on his own crop. If the laborer has absorbed his wages, in supplies furnished by his employer

---

Brief for defendant.

---

while cultivating the crop, he cannot collect them again from the employer. Nothing is due the laborer, and so his lien on the product, given by the first section, cannot be enforced. So also "an assignment of his wages, by an employee, is void as against a debt due from the employee to his employer, contracted on the faith of said wages." *Jennings v. Moffit*, Am. Law Times Reports, August, 1874, page 367. The supply bill is a discharge *pro tanto* of the lien for wages. Nor is the employer's lien a lien on the laborer's lien for wages, as suggested for plaintiff in error. This would be useless. For without the 10th section, the employer would still have the right to apply the laborer's wages to the payment of his indebtedness for supplies. And an assignment of his wages by the employee being made, the assignee would take the claim subject to the supply bill. Neither the laborer nor his assignee could enforce the first lien for wages on the product, against the employer, without allowing the payment *pro tanto*, as made by the supplies furnished. That money wages were not intended is obvious, from the last seven lines of section 10. The proceedings therein provided to enforce the employee's lien for supplies, go on the idea that the laborer is owner of part of the crop, and it requires judicial action to divest the title out of him.

It is urged in this court for the first time, that the deed in trust was recorded three months before the passage of that act. And to construe the law as giving a lien prior to the lien of the trust deed, would be to make it unconstitutional, as a "law impairing the obligation of contracts." This question arises by accident. The agreement of facts contemplates no such point. The instruction given for Betts in the court below, shows that he knew of no such question in the case at that time. On the actual evidence in the lower court, perhaps no such point could arise. Had such a question been raised in the lower court, it might have been avoided by proof. Parties cannot thus hold back their strong point to overturn the verdict in this court, in case it is against them. *Sillers v. Lester*, 48 Miss., 516-524. Had this point been

---

Brief for defendant.

---

presented, the facts would have warranted the jury in taking the view that Warren, a laborer, working for wages, had no right to his wages, until he had done the work. When the crop was matured and gathered, Warren became entitled for the first time to a part of the cotton, as compensation for his labor. But on the 5th of April preceding the acquisition of the cotton by Warren, the legislature gave Ratliff a first lien on said part of the cotton, for all supplies which he should furnish Warren. When Warren acquired the property, the lien of the trust deed and the lien for supplies, attached to it at the same time, and the lien for supplies is made the *first* lien by the statute. The lien of the trust deed could not attach to the property until it was acquired by Warren. *Moody v. Harper*, 8 Cushman, 484; *Jenkins v. Gowan*, 8 George, 446-447.

Again, the cotton in controversy was not *in esse*, until the fall of 1872. The lien of the trust deed could not attach to the property not in existence. *Butt v. Ellett*, 19 Wallace, 547. The theory on which mortgages of after acquired property are supported, is that they attach to the property *eo instanti*, on its coming into existence, and then relate back to the date of recording the mortgage, so as to cut out intermediate incumbrances. But where the subsequently acquired property comes into existence, subject to a *superior lien* that lien takes precedence of any mortgage though the mortgage be prior to it, in time. *United States v. New Orleans R. R. Co.*, 12 Wallace, 362. The agricultural lien, under the act of 1867, was a similar "*prior lien*." In *Howard v. Simmons*, 43 Miss., 89. Simmons claimed the cotton by virtue of the lien of a judgment rendered in 1859. Howard claimed by virtue of an agricultural lien enrolled in November, 1867. The court gave the judgment creditor all the cotton matured and gathered prior to the registration of the lien, and the lien creditor, all which was matured and gathered afterwards, holding that the agricultural lien was "*prior*" to the judgment lien, notwithstanding the judgment lien was the older.



---

Opinion of the court.

---

If the lien of the trust deed did not attach until the cotton came into existence, or until it was acquired by Warren, then on the 5th of April, 1872, at the time the law was passed, there existed no lien which that law could "impair." The act of April 6, 1872, could not impair a lien which had no existence at the time the act was approved. No lien attached to the cotton, under the deed in trust, until it came into existence, and was acquired by Warren. Such was the *status*, scope and effect in law of that contract. Therefore it could not be impaired by an act passed before the cotton was planted.

SIMRALL, J., delivered the opinion of the court.

The question of law arises upon an agreed case. The substantive facts are these: During the year 1872, Warren resided upon and cultivated land owned by Ratliff, "who had said Warren was employed to raise a crop for Ratliff, receiving one-third of the corn and one-fourth of the cotton raised thereon by Warren." During the year Ratliff furnished Warren with plantation supplies to the amount of \$175, who verbally agreed that Ratliff should have a lien on the crop.

Warren, on the 6th day of January, 1872, executed a deed of trust to Betts, covering the crop of cotton to be raised that year, to secure a promissory note of \$125, payable to Cummings the first of November thereafter.

Ratliff took possession of the cotton and applied it to his debt. This suit was brought by Betts, trustee for the use of Cummings, against Ratliff, for the conversion of the cotton.

The parties made no point on the testimony, but intended to raise the question whether Betts had a better right to the cotton, under the trust deed, than Ratliff, for his supplies, and the lien therefor claimed by him under the act of the 6th of April, 1872.

It will be noted that the deed in trust is about three months anterior to the passage of the law under which Ratliff asserts his lien. If by law it was competent to incumber by deed in trust

---

Opinion of the court.

---

a crop before it was planted, so that it would be operative upon a crop to be thereafter planted, grown and matured, such security, to be available, must take priority as to subsequent purchasers and creditors, from the day of its execution and notice thereof.

Whether such security could be created at the common law or not, it is entirely within the power of the legislature to authorize it.

The first clause of the 7th section of the act of 1867, for the encouragement of agriculture is to the effect "that it shall be lawful to convey, by way of mortgage or deed of trust, any crop of cotton, corn or agricultural product, being produced or to be produced within fifteen months from the date of such mortgage." We cannot doubt that the intention of the legislature is, that the mortgage or deed of trust shall have preference and priority, from its date, whether the crop be then planted or not. The prospective crop, before the seed is sown, is such potential interest or expectancy in property that it may be thus conveyed. And when the crop grows, the *subject* has come into *esse*, and the mortgage or trust deed at once takes effect upon it. The meaning of the statute is, that the security attaches to the commodity in advance of the harvest, and the right to apply it to the uses of the mortgage or deed of trust, is as of the day of the date; so that the mortgagee or *cestui que trust* would have priority over any other creditor, incumbrancer or purchaser, subsequent to the date of such security.

Such was the legislative understanding, for the 13th section of the act of 1872, April 5th, p. 135, declares "as the sense of the legislature, that all contracts heretofore entered into under the provisions of an act for the encouragement of agriculture, approved 18th February, 1867, are valid."

Manifestly, it would be *ultra vires* of the legislature to displace, defeat or impair a contract expressed in a mortgage or deed of trust, good under the act 1867, by subsequent legislation.

The act of the 5th of April, 1872, is not repugnant to, nor does it repeal the statute of 1867. The main design was, to introduce

---

Opinion of the court.

---

liens to secure the wages of the laborer or employee (see 1st section), and in favor of the employer, for supplies furnished to the laborer (see 10th section); neither of which cases were embraced in the prior statute.

The person entitled to a lien under the first section is the laborer or employee for wages, and not the tenant or lessee.

There is some obscurity in the language of the 10th section, or rather there is difficulty in giving an application of the words used, so as to make the lien beneficial against all laborers employed in the production of a crop. The lien takes effect on all "agricultural products." If the laborer is to receive *money* for wages, in such case, there is no "product" belonging to him upon which the lien can take effect for the supplies. But if the laborer is to secure part of the crop for his "wages," then the lien would take effect upon that. The "wages" may as well be for a part of the product as for money.

Washburn (1 vol. Real Prop., p. 500), after examining the cases, states that it is difficult, if not impossible to fix any rule by which to determine whether carrying on a farm by one not the owner upon shares, constitutes him a tenant with separate right of property in the crop, or a tenant in common of the crops, or a mere hired laborer or cropper. It is easy to assign many, perhaps the great majority of cases, to their appropriate class. A tenant or lessee has an interest in the soil. Generally the products of the land are his separate property, subject to a right in the landlord to the privileges conferred by law for getting his rent, whether in kind or in money. A demise of a farm, or so many acres, or a certain part thereof, for so much corn or cotton per acre, or for the entire premises, is a letting, and creates a tenancy. So of a grist mill, "for one-third of the toll which the mill grinds." *Fry v. Jones*, 2 Rawle Rep., 11. If a laborer engages to work on the farm for so many bushels of corn, or pounds of cotton for the year or other definite time, this would be rendering service for wages, and would not be a tenancy.

---

Opinion of the court.

---

Parties made this agreement: F. put out from 25 to 30 acres of the farm in wheat, F. to have two-thirds of the crop and R. one-third, held not to make F. a tenant of R. *Adams v. McKesson, Executrix*, 53 Penn. St. Rep., 84. A tenancy exists, however, if the cultivator agrees to pay a certain number of bushels of wheat as rent of the premises. *Tanner v. Hill*, 44 Barb., 430; 15 Barb., 597.

The law is well settled that there may be a letting of land from year to year, or for one year, where the relation of landlord and tenant exists, though the rent be paid in a part of the product. It is equally well settled that one party may cultivate the land of another for the purpose of making a crop, of which the owner of the land is to have a part and the cultivator a part, where the parties would be tenants in common of the crop, and would not sustain the relation of landlord and tenant.

Whether the contract be of the one kind or the other, depends on the intention of the parties, to be gathered from all the attending circumstances. *Alwood v. Ruckman*, 21 Ill., 201.

The agreed facts are very meagre in defining the terms of the contract between Ratliff and Warren. We are inclined to the opinion, and so hold, that Warren did not become the tenant of Ratliff, but was a laborer or cultivator for a share of the crop, and that he and Ratliff were tenants in common of the products.

Does the 10th section of the act of 1872 give a lien to the land owner who advances supplies to laborers who cultivate for a share of the crop? The laborer must have an interest in the "agricultural products," for that is the subject upon which the lien attaches, otherwise there is no lien. If he work for wages in money, plainly there is no lien. Generally the laborer is to be paid in a specific portion of the product, is supplied with food, the chief item of expense, by the hirer.

We must give such construction of the words, if they will admit of it, as will carry out the intention of the law maker. A large part of the crops of this state are cultivated, in common

---

Opinion of the court.

---

parlance, "on the shares." The laborers apply their industry, skill and time in planting, cultivating and gathering, on the terms of division of the crops with the land proprietor, as may be agreed. The first section as we have seen, uses the words, "labor done" for "wages." That implies a certain compensation in money or in kind. The 10th section carefully excludes the words for "wages," "work done for wages," or "laborer for wages." The words are in form of every employer as against every laborer employed by him in the production of agricultural crops.

If the section "be restricted to those who are hirelings for part of the crop, for wages," it would practically have but a narrow application, but if it be construed so as to "embrace all laborers engaged in making the crop, for a share thereof, then it would embrace that class who need, more than any others, provisions, clothing and necessary plantation supplies, and moneys advanced for their purchase." The man who is hired for wages, generally eats the food and uses the implements of his employer, and has no need of provisions, plantation supplies, or money to buy them. But the man who works for a share of the crop, generally furnishes his own provisions, clothing, etc., and if he has not the ready means of doing so, they must be got upon a credit. This section offers such security to the employer, whose land he cultivates, that he would be safe in meeting his wants. We are of opinion, therefore, that this section was designed to embrace that large class of laborers who make crops for their "employers," on the shares, and with whom they are tenants in common of the products, and to whom the "employer," whether owner or lessee, furnishes "provisions, clothing and necessary plantation supplies, or money" to procure the same. The law creates the lien to induce such land proprietor to give the credit, and thereby enable laborers to make crops on that plan. That construction would carry out the double purpose, first, of securing the laborer, and, secondly, the land owner. The act of April 17, 1873, is amendatory of and an enlargement of the operation of the act of April,

---

Opinion of the court.

---

1872. The first section so extends the lien, as that it protects the interest of the laborer in the crop, until a just and equitable decision thereof; and also protects the share and interest of the landlord, against any debt or judgment against such tenant. The entire scope of the first section of this act, is to assure to the cultivator, on the shares, his equitable and just portion of the crop, and to the land proprietor his part, so that the interest of neither shall be affected by the debts or incumbrances of the other.

It only remains to consider, whether advances made by Ratliff, on the faith of the act of April, 1872, is paramount to the right arising under the trust deed. Clearly the legislature could not create a statutory lien which would impair a prior lien expressly permitted by law. Indeed the thirteenth section declares as much, and makes valid, mortgages and deeds of trust theretofore made.

The case made by the agreement of the parties does not state *when* the supplies were furnished, with more definiteness than is implied in the words "during the year." Certainly Ratliff had no lien for such advances, before the 8th of April, the date of the passage of the law which conferred it. The deed of trust of date 2d of January, preceding, is prior to the law under which Ratliff's claim arose, and took effect upon the crop so soon as it grew.

The question is not involved in this record, of the relative superiority of liens, for advances begun to be made after this act passed, and running through the year, and a deed of trust made after the same date.

We are of opinion that the plaintiff ought to have recovered. Judgment reversed and a new trial awarded.

---

Statement of the case.

---

## M. &amp; O. RAILROAD CO. v. JOHN HUDSON.

1. **RAILROADS—LIABILITY FOR INJURY TO STOCK.**—If stock intrude upon a railroad track, the company has no claim for damages against the owner; and for the damages done by railroad trains to stock, the liability of the company depends upon whether the injury was caused by negligence or mismanagement. The party claiming damages must prove that due precaution to prevent the injury was not used by the company, or its employees. Injury to animals is not of itself evidence of negligence. It must be established by positive proof.
2. **SAME—SAME.**—Where the testimony fails to explain the circumstances of the injury or killing, but the plaintiff trusts to the simple fact of the injury or killing from which to deduce the inference of negligence or misconduct of the company or its servants, he comes short of proving his case.

ERROR to the Circuit Court of Colfax County. Hon. J. A. ORR, Judge.

This was an action of trespass on the case, brought by defendant in error, in the circuit court of Colfax county, against the Mobile and Ohio railroad company for \$500 damages, for the alleged killing of one horse, the property of the said defendant in error.

The plaintiff, in the court below, introduced his testimony, to which defendant demurred, and the court overruled the demurrer to the testimony, and entered a judgment against the defendants for \$220, and costs, from which judgment the case comes to this court on writ of error.

The following is assigned for error:

1. The court erred in overruling the demurrer to the evidence, and in giving judgment for the plaintiff.

2. The court erred in rendering judgment for plaintiff without submitting the case to a jury to assess the plaintiff's damages on a writ of inquiry.

*Barry & Brame*, for plaintiff in error:

The burden of proof is on the plaintiff to show negligence or

---

Opinion of the court.

---

misconduct; it will not be presumed. N. O., J. & G. N. R. R. Co. v. Enochs, 42 Miss., 608; M. C. R. R. Co. v. Blakeney, 43 ib., 218; Raiford v. M. C. R. R. Co., 43 ib., 233; M. C. R. R. Co. v. Miller, 40 ib., 45. The killing is not *prima facie* evidence of negligence. Terry v. N. Y. C. R. R. Co., 22 Barb., 574; Herring v. Wil. & Rel. R. R. Co., 10 Iredell, 402; 13 Ill., 548; 17 Ill., 580; 35 Maine, 422; 4 Rich. R., 329; Pierce on Am. R. R. Law, 357; 1 Hilliard on Torts, §§ 125, 126. The demurrer admits everything the evidence proves and everything it tends to prove. 43 Miss., 233; 1 Johns., 29.

*Thos. E. Bugg*, for defendant in error:

1. It is well settled that a demurrer to evidence admits the truth of all that the evidence proves or tends to prove, and admits the force of such inferences as the jury might reasonably draw from the testimony. Phil. on Ev., 1 vol. (2 Am. Ed.), p. 313; Chewning et al. v. Gatewood, 5 How., 552; M. & O. R. R. Co. v. McArthur, 43 Miss., 180.

2. The second ground of demurrer is, rendering judgment without a writ of inquiry.

This question arose in the case of M. & O. R. R. Co. v. McArthur, 43 Miss., 180. In that case there seemed to be no proof of the extent of injury, and the court held that a writ of inquiry should have been awarded. In this case, there was proof of the value of the horse, and that is admitted by the demurrer.

SIMRALL, J., delivered the opinion of the court:

The killing of an animal of value by a railroad company's engines, is not *ipso facto*, evidence of negligence. 1 Red. R. R., 466.

In this state, from long custom, and its recognition by statutory law, the owner of cattle may allow them to go at large, and is not liable for damage done by them, on uninclosed premises. V. & J. R. R. Co. v. Patten, 31 Miss. Rep., 190. If they intrude upon a railroad tract, the company has no remedy against the owner. And for injuries done by the company's locomotives and trains,



---

Opinion of the court.

---

liability to make compensation is dependent on circumstances, as whether the injury was the result of negligence, carelessness or mismanagement. *Raiford v. R. R. Co.*, 43 Miss., 233; *R. R. Co. v. Blakeney*, 43 Miss., 222; *R. R. Co. v. Miller*, 40 Miss., 47; *N. O., J. & G. N. R. R. Co. v. Enochs*, 42 Miss., 605. The statute determines the liability to be for such losses as are the result of negligence or mismanagement of the company or its servants.

It rests upon the party complaining of injury to, or destruction of stock, to show, in evidence, that it was superinduced by the carelessness or negligence of the company, or its agents and servants. If the testimony fails to explain the circumstances of the injury, or killing, but the plaintiff trusts to the simple fact of injury, or killing, from which to deduce the inference of negligence or misconduct, he comes short of proving his case.

It remains to consider whether the testimony proves, or fairly conduces to prove, such fault, in the company's servants, in charge of the train.

The horse had been shut up in the plaintiff's stable lot, which was near the railroad. The plaintiff had been in the habit of turning the animal into a pasture on the opposite side of the road. About two hours before daylight saw the horse in the stable lot; the killing by the passing train was about half an hour before daylight, on a dark night. The plaintiff in his testimony states, that he supposes the horse was going to this pasture. "The horse was killed in Mr. Torbitt's field, where there is a small cut in the road, and on the side of the road next the house." At the point where the horse went upon the track, there was a thicket of small plum trees. Witness did not know of any negligence or misconduct of the engineer or other servants of the company, nor was there any proved, except the omission to sound the alarm whistle. The company's servants were under a duty, if they saw the animal exposed to danger, to use all reasonable precautions to prevent injury, such as sounding the alarm whistle, checking up the train. But the legitimate inference is that the horse was

---

Syllabus.

---

struck as he was crossing the track at the plum thicket, before he was seen by the engineer, and when whistle and break would have been unavailing.

Under the rule established by the statutes and adjudications, that it is incumbent on the plaintiff to show negligence, or misconduct of the company or its servants, we are of the opinion that their default in this respect is not to be inferred from the circumstances in evidence, but rather, that the animal was not seen by the engineer until he emerged from the thicket and came upon the track, and then it was too late to check the train, or frighten the animal from the track.

We think the judgment on the demurrer upon the evidence ought to have been for the defendant, and accordingly award judgment here.

---

L. W. SMITH v. JOSEPH EVERETT.

1. **PRACTICE—EQUITY—JURISDICTION.**—The constitution confers upon the chancery court full jurisdiction of all matters in equity, and equity is defined to be that system of justice which is administered by the high court of chancery in England in the exercise of its extraordinary jurisdiction; but the ordinary branch of that court constitutes no part of the jurisdiction of the court of chancery here.
2. **SAME—ADMINISTRATION OF ESTATES.**—In this country, the jurisdiction over the administration of estates of decedents is conferred upon courts of probate, surrogate or orphan's courts, which, in general, possess the powers of the ecclesiastical courts of England upon the subject. Proper means are provided to compel the executors and administrators to collect the assets, to settle proper accounts, and to satisfy the claims of creditors, legatees and distributees. But it sometimes happens that, in order to obtain the relief required, other remedies than those which are incident to the procedure in these tribunals are necessary, in which case a resort to chancery becomes unavoidable. Thus, a bill may be filed by a creditor, to subject to his debts real or personal property fraudulently disposed of by the decedent in his life-time. Or, to follow assets which have passed into the hands of legatees or distributees, where the remedies against the

---

Brief for appellant.

---

executor or the administrator have been exhausted. And, in some other instances, the equitable remedy has to be invoked, in order to meet cases which cannot be properly dealt with in other tribunals.

3. **SAME—ADMINISTRATOR—HOW FAR HE IS A TRUSTEE.**—It has been sometimes said, that an executor or administrator holds the assets in the character of a trustee, and that the jurisdiction of equity attaches on the existence of the trust. It is true that, in one sense, an executor or administrator may be called a trustee, as any person may be so called who is bound to apply property for the benefit of others; but he is not a trustee in that technical sense, so as to give a court of equity jurisdiction on the grounds of equity alone. The jurisdiction of the chancery court and the probate court are separate and distinct in their powers, purposes and objects, and are not to be confounded, though administered by the same tribunal. *Troup v. Rice*, 49 Miss., 250.
4. **SAME—SUIT ON THE BOND OF AN ADMINISTRATOR.**—The sureties on an administration bond cannot be properly joined in proceedings against the administrator for an account and final settlement of the estate. They are responsible only upon the bond, and must be sued at law, after proper steps have been taken to fix the liability of the administrator. *Green, Adm'r, v. Tunstall*, 5 How., 651. The bond, with its conditions, is not intended to transfer the jurisdiction from the probate court.
5. **SAME—SAME—CONSTITUTIONAL LIMIT, REVISED CODE 1871, SEC. 976.**—So much of section 976, of the Revised Code of 1871, as attempts to confer upon chancery courts power and jurisdiction to entertain suits on the bonds of executors and administrators and guardians, is unauthorized by the constitution, and void.

APPEAL from the Chancery Court of Noxubee County. Hon. THOMAS CHRISTIAN, Chancellor.

The facts in this case are stated sufficiently full in the opinion of the court.

The following is assigned for error, to wit:

"The court erred in overruling defendant's demurrer to complainant's bill filed."

*Foote & Foote*, for appellants:

The bill, on its face, does not make out a case for equitable relief, because the decree rendered upon the final account of Stone was against him as administrator of Carraway, in favor of the appellant and others, heirs of Benjamin Sherrod, deceased.

---

Brief for appellee.

---

Stone, as administrator, should have brought the money into court for distribution. He should have sued the sureties of Caraway for the deficit, but instead of doing so, he reported a defalcation of a certain amount, and divided by the decree of the court that which he did not have, alleging the estate of Caraway to be insolvent, thereby creating a liability against the sureties without notice. The bill is filed by Joseph Everett alone, and it shows that there are other parties interested who are not made parties complainants or defendants. All the parties in interest should have been before the court. *Bailey v. Ingles*, 2 Paige, 278; *Story's Eq. Pl.*, §§ 187, 287.

The bill discloses the fact that the complainant, if entitled to recover at all, has a full and complete remedy at law. *Mittf. Eq. Pl.*, 123-5-6; *Story's Eq. Pl.*, §§ 490, 47; 3 *Cooper's Eq. Pl.*, 124. Equity jurisdiction will be entertained to redress a wrong, where there is no plain, adequate and complete remedy at law. 1 *Story's Eq. Jur.*, § 49. It is a rule well settled in chancery proceedings, that a multiplicity of suits must be avoided, and will not permit a decree upon a bill for a part of a matter only, where the whole can be brought and determined in one suit. *Cooper Eq. Pl.*, 184, 5; *Mittf. Eq. Pl. Jur.*, 183; *Story's Eq. Pl.*, sec. 287.

*Jarnagin & Rives*, for appellee:

The bill was filed by Joseph Everett, against the sureties on the administrator's bond, to enforce the collection of \$409.67, the amount found to be due him on final settlement of the estate, as one of the heirs at law and distributees of the estate of Benjamin Sherrod, deceased, under the provisions of sec. 976 of the Revised Code of 1871; to this bill, defendant Smith filed a demurrer, which was overruled by the court. We submit to the court, whether art. 3, sec. 976, does not settle the first cause of demurrer, and by which the chancery court has full and complete jurisdiction of the subject matter of this suit. In relation to the second ground of demurrer, there is nothing in the bill which shows any interest in any other person for the amount claimed. The amount

---

Opinion of the court.

---

due Everett is fixed by decree of the chancery court, separated from the gross amount, and he alone is interested in it, and others cannot be made parties to it. Story's Eq. Pl., 207, 225, 235. This cause of the demurrer is defective. See Story's Eq. Pl., 238.

PEYTON, C. J., delivered the opinion of the court :

It appears from the record in this case, that Joseph G. Caraway as administrator of the estate of Benjamin Sherrod, deceased, entered into bond with C. C. Tate, R. Sherrod and L. W. Smith as his sureties therein, for the faithful administration of said estate. That after a partial administration of the estate, the said Caraway died, and Lewis Stone became his administrator, who made a settlement of his intestate's account as administrator of the estate said Benjamin Sherrod; and upon said settlement, the estate of of the said Caraway was declared to be due and indebted to Joseph Everett, one of the heirs of the estate of the said Benjamin Sherrod, the sum of \$409.67, which was decreed to be paid to him as his distributive share of said estate.

The said Joseph Everett filed his bill in the chancery court of Noxubee county, alleging the above stated facts, and also that no assets of the estate of the said Caraway ever came to the hands of his administrator, who resides in the state of Alabama, and that the estate of said Caraway is wholly insolvent; that R. Sherrod, one of the sureties on the administration bond of the said Joseph G. Caraway, is deceased, and no administration of his estate has been had. That said sum of money remains due and unpaid to the complainant, who prays in his said bill that upon a final hearing of the cause, the said C. C. Tate and L. W. Smith, as sureties upon said administration bond, may be ordered and decreed to pay to the complainant the said sum of \$409.67, found due him upon settlement as aforesaid, for his distributive share as one of the heirs of the said Benjamin Sherrod, deceased.

To this bill of complaint, one of the defendants, L. W. Smith, filed a demurrer, alleging among others, as causes of demurrer,

---

Opinion of the court.

---

the want of equity on the face of the bill, and that there is a full and adequate remedy at law. The demurrer was overruled by the court, and hence the cause is brought to this court by the said L. W. Smith, who assigns for error the action of the court below in overruling the demurrer.

This case presents the important question for our consideration, whether under our system of jurisprudence, a court of chancery can entertain jurisdiction, and give relief against sureties on the administration bond, for the breaches of the condition thereof by the administrator in the maladministration of the estate. And in the decision of this question, it becomes necessary to inquire into the powers and jurisdiction of the court of chancery under our present constitution.

The 16th section of the 6th article of the constitution provides, that chancery courts shall be established in each county in the state, with full jurisdiction in all matters in equity, and of divorce and alimony; in matters testamentary and of administration; in minors' business and allotment of dower, and in cases of idiocy, lunacy and persons *non compos mentis*. From this, we see that the constitution confers upon the chancery court full jurisdiction of all matters in equity, and equity is defined to be that system of justice which is administered by the high court of chancery in England in the exercise of its extraordinary jurisdiction. Bispham's Principles of Equity, 1. Upon reference to the history of that court in England, it will be seen that it consisted of two distinct tribunals: the one, ordinary, being a court of common law; the other, extraordinary, being a court of equity. The ordinary branch of that court constitutes no part of the jurisdiction of the court of chancery here.

In England, the administration of estates of decedents belonged to the ecclesiastical courts, and in this country the jurisdiction over the administration of the estates of decedents is conferred upon courts of probate, surrogate or orphans' courts, which, in general, possess the powers of the ecclesiastical courts in England upon the

---

Opinion of the court.

---

subject. Proper means are provided to compel the executors and administrators to collect the assets, to settle proper accounts, and to satisfy the claims of creditors, legatees and distributees. But it sometimes happens, that in order to the relief required, other remedies than those which are incident to the procedure in these tribunals, are necessary, in which case a resort to chancery becomes unavoidable. Thus, a bill may be filed by a creditor to subject real or personal property, fraudulently disposed of by the decedent in his lifetime, to his debts. *Pharis v. Leachman*, 20 Ala., 662, and *Hagan v. Walker*, 14 How., 29. Or to follow assets which have passed into the hands of legatees or distributees, where the remedies against the executor or administrator have been exhausted. *Ledyard v. Johnston*, 16 Ala., 548. And in some other instances, the equitable remedy has to be invoked in order to meet cases which cannot be properly dealt with in other tribunals.

It has been sometimes said that an executor or administrator holds the assets in the character of a trustee, and that the jurisdiction of equity attaches on the existence of a trust. It is true that in one sense, an executor or administrator may be called a trustee, as any man may be so called who is bound to apply property for the benefit of others; but he is not a trustee in the technical sense, so as to give a court of equity jurisdiction on the ground of trust alone.

Judge Story says, that much of the English doctrine in regard to the extent and the foundation of equity jurisdiction, in matters affecting the settlement of estates, has no application to many of the American states. The courts of probate in this country have ample powers, both in the extent of their jurisdiction and their mode of procedure, for the accomplishment of the principal objects, upon the attainment of which the English equity jurisdiction, in such matters, is founded. Hence, in this country, courts of equity do not ordinarily interfere in the administration of estates. 1 Story's Eq., sec. 543.

---

Opinion of the court.

---

Prior to the adoption of the present constitution, the administration of estates of decedents pertained almost exclusively to the courts of probate, which were governed by a system of laws adapted to that purpose. The administration of these probate laws was transferred by the constitution to the chancery courts, and forms a branch of the chancery court, separate and distinct from that of a court of equity proper. These jurisdictions, distinct in their powers, purposes and objects, although administered by the same tribunal, are not to be confounded. The chancery court in the administration of the probate laws must be governed by the same rules and principles of law which governed the courts of probate, before the transfer of their jurisdiction in matters testamentary, and of administration to the chancery courts. And this view accords with the decisions of this court in the cases of *Troup v. Rice*, 49 Miss., 250; *Saxon v. Ames*, 47 ib., 568; and *Wells v. Smith*, 44 ib., 304.

The equity jurisdiction conferred upon the chancery court by the existing constitution cannot be enlarged by legislative enactment; common law powers cannot be thus given to it.

The case of *Payne v. Hook*, in 7 Wallace, 425, was a bill in chancery against the administrator and the sureties on his bond. The bill charges gross misconduct on the part of the administrator; that he had made false settlements with the probate court; withheld a true inventory of the property in his hands; used the money of the estate for his private gain; and obtained from the complainant, by fraudulent representation, a receipt in full of her share of the estate, on payment of a less sum than she was entitled to receive. The object of the bill was to obtain relief against these fraudulent proceedings, and to compel a true account of administration, in order that the real condition of the estate may be ascertained, and the complainant paid what justly belongs to her. It appeared from the bill that Hook had not yet made his final settlement. In that case the court say that the circuit court of the United States, for the district of Missouri, had jurisdiction to hear



---

Opinion of the court.

---

and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a full, complete and adequate remedy at law, affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleadings. The facts as charged in the bill show abundant elements of equity. The court says: "It is very evident that an action at common law, on the bond of the administrator, would not give to the complainant a practical and efficient remedy for the wrongs which, she says, she has suffered. A proceeding at law is not flexible enough to reach the fraudulent conduct of the administrator, which is the ground work of this bill, nor to furnish proper relief against it.

In this state it is believed that the sureties on an administration bond cannot properly be joined in proceedings against the administrator for an account and final settlement of the estate. They are responsible only upon the bond, and must be sued at law, after proper steps have been taken to fix the liability of the administrator. *Green, Adm'r, v. Tunstall*, 5 How., 651. It is held in Alabama to be the true rule that an action can only be maintained against the sureties on the bond at law, and then only after a final settlement and decree of the court ascertaining the amount of the liability of the administrator, and directing him to pay it. This appears to be the settled doctrine in that state. 1 Porter, 70, and 3 Stewart and Porter, 263 and 348. The same rule prevails in South Carolina, where it has been repeatedly decided that the sureties on an administration bond cannot be made parties to a proceeding against the administrator for an account, but can only be made liable on the bond in a suit at law after a decree against the administrator on the settlement of his accounts. *Simkins v. Cobb*, 2 Bailey, 60; *Ordinary v. Robinson*, 1 Bailey, 27; 1 Nott & McCord, 587, and 4 Nott & McCord, 113 and 120. This is believed to be the doctrine of Virginia.

---

Opinion of the court.

---

The ordinary bond for faithful administration is not intended to transfer the jurisdiction of questions connected with such administration from the appropriate and exclusive sphere of the courts exercising probate jurisdiction to that of the common law courts. But these bonds are designed to secure the enforcement of the decrees of the court having jurisdiction in matters testamentary, and of administration, such as the chancery court under our present judicial system, which has succeeded to the jurisdiction of the probate court under the former system in the administration of estates of decedents. But after the amount due the party in interest has been ascertained, and the court administering the probate laws has decreed the payment of the amount so found due, the party is in condition to enforce his remedy upon the administration bond in a court of law. 3 Redfield of the Law on Wills, 95; *Gandolfo v. Walker*, 15 Ohio, N. S., 251.

Where courts of equity exist, as in this state, their jurisdiction should be kept separate and distinct from that of the courts of common law. Bonds are legal obligations, and suits to recover damages for the breach of their conditions are properly cognizable in the courts of law. Before the adoption of the present constitution when the administration of decedent estates pertained to the court of probate, we are not aware of any suit having ever been brought in a court of equity on an administrator's bond for the recovery of damages for breaches of the condition thereof. But such suits were invariably instituted in the courts of law. For a time such bonds were made payable to the judge of probate, and were put in suit in his name for the use of any person injured by the breach thereof. And the present law provides that the bonds of executors, administrators and guardians shall be made payable to the state of Mississippi, and shall be put in suit in the name of said state, for the use and benefit of any person injured by the breach thereof. Section 311 of the Code of 1871.

In a court of law suit is sometimes brought in the name of the person having the legal title to the instrument sued on for the use

---

Syllabus.

---

of the equitable owner; but this is never done in a court of chancery. The equitable owner brings the suit in his name, and recovers on his equitable title. This provision of the Code clearly shows that the legislature contemplated no change in the forum in which suits shall be brought on these official bonds. And therefore so much of section 976 as attempts to confer upon chancery courts power and jurisdiction to entertain suits on the bonds of executors, administrators and guardians, is unauthorized by the constitution, and void.

In most of the American states at the present day, courts of equity interfere in the administration of estates to a very limited extent, and only where the powers of the courts of probate, or of those exercising their jurisdiction, and their modes of procedure preclude them from doing complete justice. There must be some equitable element in the case to justify the interposition of a court of equity proper in the administration of estates of decedents.

The decree must be reversed, and this court proceeding to render such decree as the court below ought to have rendered, doth order, adjudge and decree that the defendant's demurrer to the complainant's bill of complaint be sustained, and the bill dismissed.

---

L. B. PREWETT et al. v. B. F. NASH.

1. PRACTICE—JUSTICE OF PEACE—APPEALS.—This court upon a writ of error from the circuit court cannot review the proceedings in the case had before a justice of the peace, and correct any irregularity therein.
2. SAME—JUDGMENT—DAMAGES.—On an appeal from a justice of the peace to the circuit court, if the verdict be for the plaintiff in the original suit, ten per cent. damages shall be included in the judgment, and the judgment should be rendered against the principal and his sureties on the appeal bond jointly. Code of 1871, § 1334.

ERROR to the Circuit Court of Pike County. Hon. JAMES M. SMILEY, Judge.

---

Brief for plaintiffs.

---

Defendant in error sued plaintiffs in error before a justice of the peace, for \$125. The jury found a verdict for the "full amount claimed and the costs of suit." After the jury had returned their verdict and were discharged, they were recalled by the justice, and added to their verdict the following words: "The amount claimed being \$125," and judgment was entered accordingly. From this judgment plaintiffs in error appealed to the circuit court. Upon the trial in the circuit court there was a verdict for defendant in error for \$40, and judgment was entered accordingly against plaintiffs in error and the surety on their appeal bond for that sum, with ten per cent. damages, interest and costs.

From which judgment they prosecute a writ of error to this court, and assign as error:

1. The circuit court should have reversed the judgment of the justice, and have remanded the cause for trial, it being irregular for the justice to recall the jury after they were discharged, to amend their verdict, and then to enter judgment on the amended verdict.

2. The judgment of the justice was for \$125 and costs. The verdict in the circuit court was for only \$40. It was error for the circuit court to award ten per cent. damages in such a case, or to give judgment against the surety on the appeal bond.

*George L. Potter*, for plaintiffs in error, contended:

1. That it was irregular for the justice to recall the jury to amend their verdict after they had been discharged, and then to enter judgment on the amended verdict. That the circuit court should have reversed that judgment and have remanded the cause for a trial before the justice, that being the only mode to correct such errors.

2. That the judgment before the justice was for \$125 and costs. On the appeal to the circuit court the verdict was for only \$40. As the verdict was less in the circuit court, plaintiffs in error prevailed on the appeal, and it was error to charge the ten per cent. damages and to enter judgment on the appeal bond.

---

Opinion of the court.

---

*S. E. Packwood*, for defendant in error.

Reporters find no brief on file for defendant in error.

SIMRALL, J., delivered the opinion of the court.

There was verdict and judgment in the court of the justice of the peace for one hundred and twenty-five dollars. On the trial of the appeal *de novo* in the circuit court, the plaintiff obtained a verdict for forty dollars. Thereupon, judgment was rendered against the defendant (who was the appellant), and his surety in the appeal bond for the amount of the verdict, and ten per cent damages thereon. There is no bill of exceptions.

It is objected, in this court, that it was irregular, after the justice of the peace had permitted the jury to disperse, to recall them and allow an amendment of their verdict, so as to put it in apt form.

But, upon this writ of error, we cannot review the proceedings before the justice of the peace, and correct the irregularity complained of, if, indeed, it amounted to fatal error.

The second objection is, that it was error to render a judgment against appellant and his surety for the \$40 and ten per cent damages, since he had succeeded in reducing the judgment awarded by the justice of the peace.

The practice in such cases is given by the statute, and the judgment complained of is in strict accordance with it. "If," says the statute (§ 1334, Code of 1871), "the defendant be the appellant, and judgment be rendered for the plaintiff in the original suit, ten per cent. damages thereon shall be included in such judgment and costs, and judgment shall be rendered against the principal and his sureties jointly." Moreover, the condition of the bond is "for the payment of such judgment as the said circuit court may render." § 1332, Code.

There is no error. Let the judgment be affirmed.

## Statement of the case.

## MARGARET STEWART v. THE STATE OF MISSISSIPPI.

1. **CRIMINAL LAW — CHANGE OF VENUE — CONTINUANCE.** — This court will not reverse a judgment because the circuit court refused to grant a change of venue, unless there has been an abuse of discretion vested in the circuit court. Rev. Code, 1871, § 2762. On application for a continuance, "if compulsory process will possibly obtain the attendance of the absent witness, and the defendant has had no opportunity of obtaining such process, the cause shall be continued, unless the defendant desires a trial." Rev. Code, 1871, § 2806; Noes' case, 4 How., 330; McDaniel's case, 8 S. & M., 401; Lundy's case, 44 Miss., 669.
2. **SAME — JUROR — PEREMPTORY CHALLENGE.** — The peremptory challenge of a juror by the state, after he has been presented to the prisoner, is in disregard of the positive letter of the statute. "All peremptory challenges by the state shall be made before the juror is presented to the prisoner." Rev. Code, 1871, § 2761.
3. **SAME — INSTRUCTIONS — ORAL.** — It is a violation of the law and the well settled practice and policy of the state, to give oral instructions, on the court's own motion, in civil or criminal cases. Rev. Code, 1871, § 643.

ERROR to the Circuit Court of Hinds County (1st Dist.). Hon. GEORGE F. BROWN, Judge.

Plaintiff in error was indicted by the grand jury for the 2d district of Hinds county, at the January term, 1873, of the circuit court of said county, for the murder of Thos. Boatman. At the June term, 1873, of said court, the cause was continued; at the December term, 1873, a motion was made for a change of venue, which was, by the court, overruled, and a special venire ordered and drawn; the sheriff returned the venire, and the case was continued until the next day; and on the next day, plaintiff in error made application for a continuance of the cause until the next term of the court, which motion was overruled, and the accused was arraigned and pleaded "not guilty," and the court proceeded to impanel a jury to try the case. The court announced that after the legal number of jurors had been impaneled, if the state or the defendant had not exhausted all their *peremptory challenges*, they, or either of them, could except to such of

---

Opinion of the court.

---

the jurors in the box as they, or either of them, might desire to challenge, to the extent of their peremptory challenges, not then exhausted.

Plaintiff in error excepted to the ruling of the court, in refusing to grant a change of venue, in refusing a continuance, and in permitting the state to challenge jurors, after they were seated in the jury box.

After the jury had retired, they returned into court, unable to agree, and the court of its own motion, gave them oral instructions, to which ruling, the plaintiff in error excepted. The jury found the accused guilty of manslaughter, and the court sentenced her to — years' imprisonment in the state penitentiary, and the case comes to this court upon writ of error.

*Johnston & Johnston*, for plaintiff in error, filed an elaborate brief, and argued the case orally.

*S. M. Shelton*, on the same side, filed a brief.

*G. E. Harris*, attorney general, for the state, filed a brief, and argued the case orally.

TARBELL, J., delivered the opinion of the court :

The plaintiff in error was indicted for the crime of murder, and on the trial, was found guilty of manslaughter. In the progress of the trial, several exceptions were taken, as indicated by the errors relied on in this court, to which a writ of error has been prosecuted to obtain a review of the action and rulings of the court below. The grounds relied on for a reversal of the judgment, and for a new trial, are these: In declining to grant a change of venue; in refusing a continuance; in permitting the state to challenge a juror peremptorily after he had been presented to and accepted by the prisoner, and found competent; in overruling motion in arrest of judgment; in refusing to allow a record of marriage to be introduced in evidence to contradict a witness for the state; in giving oral instructions to the jury unasked by either party; and in overruling motion for a new trial.

---

Opinion of the court.

---

No abuse of the discretion vested in the circuit court to grant or refuse a change of venue or a continuance is shown. As to change of venue, Code, § 2762. With reference to a continuance, Code, § 2806; the last paragraph of which is as follows: "but if compulsory process will possibly obtain the attendance of the absent witness, and the defendant has had no opportunity of obtaining such process, the cause shall be continued, unless the defendant desires a trial."

The record shows no attempt to obtain compulsory process, except as to one witness, and as to that one, it was not shown that the witness would not be brought into court on the process issued against him, nor as to the others, that their attendance could not possibly be obtained by such process. On this branch of the case, no error appears, within the adjudication of this court, with reference to the discretion over the question in the circuit court. Code, § 2806; Noes' case, 4 How., 330; McDaniel's case, 8 S. & M., 401; Lundy's case, 44 Miss., 669.

It was conceded on the argument that the motion in arrest of judgment was properly overruled.

As to the effect of the repeal of sec. 8 of the act of April 5, 1872, and hence, whether this case presents the question of a bar, under that statute, and whether the record of marriage was material and competent testimony, are points not pressed in the oral argument, nor are they fully presented in the briefs filed. It is believed they are readily solved by reference to the text books, and adjudications. The examination of the questions embraced in this assignment of error is therefore pretermitted at this time.

The peremptory challenge of a juror by the state, after he had been presented to the prisoner was in disregard of the positive letter of the statute. The Code, § 2761, enacts that "all peremptory challenges by the state shall be made before the juror is presented to the prisoner." And in giving oral instructions to the jury by the court, on its own motion, not only the plain provision of the law, but the well settled practice and policy of this state



---

 Syllabus.
 

---

were violated. Code, § 643. The instruction objected to was material and vital. Hence, the motion for a new trial ought to have been sustained. This result is inevitable, with or without regrets. All persons accused of crime are entitled to a trial according to the forms, the letter and the spirit of the law.

Judgment reversed, cause remanded and a *venire de novo* awarded.

---

 M. MORRIS v. SHRYOCK & ROWLAND.

- |    |     |
|----|-----|
| 50 | 590 |
| 79 | 58  |
1. ATTACHMENT — JUSTICE OF THE PEACE — JURISDICTION. — Where M. sued out two attachments against S. & Co., on two promissory notes, one for \$112.70, and the other for \$139.28, making the sum of \$251.98: *held*, that the plaintiff could not divide his claim so as to bring it within the jurisdiction of a justice of the peace, and that the justice of the peace had no jurisdiction of the case. Such a division of a claim is prohibited by the law, in order to prevent a multiplicity of suits and unnecessary accumulation of costs. Const., art. 6, section 23; Grayson v. Williams, Walker, 298; Scofield v. Pensons, 4 Cushman, 402.
  2. SAME — CIRCUIT COURT — CERTIORARI. — When a cause is brought by *certiorari* from a justice's court, to the circuit court, the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings, and in case of affirmance of the judgment of the justice, the same judgment shall be given as on appeals. In case of a reversal, the circuit court shall enter up such judgment as the justice ought to have entered, if the same is apparent, or may then proceed to try the cause anew on its merits. Rev. Code, 1871, § 1836.
  3. SAME — NEW TRIAL BY JUSTICE'S COURT. — Where the attachment is sued out and levied, and a third party claims the goods, and tenders an issue, and upon that issue the jury found for the defendant, and the justice of the peace sets aside the verdict and grants a new trial: *held*, that the justice had no power to set aside the verdict and grant a new trial; and even if that court possessed such power, it is not such a judgment as could be removed to the circuit court by appeal or *certiorari*, being only an interlocutory order in the progress of the cause. Where there is a verdict in a justice's court, in a case in which he has jurisdiction, it is his duty to enter judgment on such verdict, and his action in setting aside the verdict and granting a new trial is simply void, and could furnish no

## Brief for plaintiff.

grounds for carrying the case to the circuit court, and the circuit court would have no power to retain the suit and try it.

4. **SAME — ATTACHMENT — STOPPAGE IN TRANSITU.** — What effect has the levy of an attachment upon the rights of the defendants in error, as vendors, to stop the goods *in transitu*? The right of stoppage *in transitu*, though first introduced and founded in equity, has long been considered and acted upon as a legal remedy. The justice of the right is admitted and recognized in constant practice, as an extension of the lien which the vendor has for the recovery of possession of the goods, as a legal possessory remedy.
5. **SAME — SAME — CASE IN JUDGMENT.** — The attachment at the suit of M. against S. & Co., was levied on goods on the wharf boat, which had been purchased on credit by S. & Co. of Shryock & Rowland of St. Louis, who shipped the goods to S. & Co., but before S. & Co. obtained possession the attachment was levied, after which S. & R. set up their claim to the goods, under their right of stoppage *in transitu*. Under these circumstances, the actual shipment of the goods to the vendees by their order, constituted a good contract of sale, and a good constructive delivery so as to vest the property in the goods in the vendees, and place them at their risk, yet it was subject to the right of the vendors to stop the goods *in transitu*, in case the vendees became insolvent, this right may be exercised at any time before the goods come into the actual possession of the vendees.

ERROR to the Circuit Court of Washington County. Hon. C. C. SHACKLEFORD, Judge.

The facts in this case appear sufficiently in the opinion of the court.

*F. & L. B. Valliant*, for plaintiff in error:

It was error to quash the *certiorari*, and the circuit court had no jurisdiction of the case. There was no *final judgment* in the justice's court, the case was still in his court undetermined, and the circuit court could not oust the justice of his jurisdiction. See Rev. Code, 1871, § 1336. No trial was had as to the claim of Shryock & Rowland, until it reached the circuit court, nor does it appear that an issue was joined. If it was error to grant the new trial, and if the justice's court had proceeded to the final trial of the case and given final judgment, from which an appeal had been

---

Brief for defendants.

---

taken, the circuit court could then have corrected the error, as it would have then had jurisdiction of the case, and might have set aside the new trial, and have affirmed the first judgment, on the ground that the new trial was granted improperly. *Prewett v. Coopwood*, 30 Miss., 369; *Frizell v. White*, 27 Miss., 198.

The *certiorari* can only be granted upon a petition showing good cause, and then the court is confined to questions of law. Rev. Code, 1871, § 1336.

It was error in the circuit court to try the claim of Shryock & Rowland to the property attached as an original trial, there having been no trial on this issue in the justice's court.

We take the following to be the principal facts in the case: V. L. Sanders & Co., merchants at Greenville, sent an order on Shryock & Rowland, merchants at St. Louis, for a lot of goods to be shipped and sold to Sanders & Co., on a credit; the goods were sent and received on the wharf boat. Accordingly Shryock & Rowland drew on Sanders & Co., at 30 and 60 days, and sent the bills to Worthington, Buckner & Co., bankers at Greenville, for collection. Whilst on the wharf boat the goods were attached. Under this state of facts, the instructions were erroneous.

*W. L. Nugent*, for defendant in error:

1. There was an error in granting the writ of *certiorari*. The point involved was one of law purely. The singular freak of the magistrate in granting a new trial is not countenanced by any law, and certainly there is no rule of public policy that would justify one man to sit in judgment upon the verdict of six having equal ability, and a greater disposition to hold the scales of justice evenly balanced. The whole proceeding after the verdict of the jury was *coram non judice*. If the plaintiff in attachment desired any further litigation, he should have taken an appeal. Rev. Code, 1871, § 1362.

2. The circuit court should have dismissed the whole proceeding in both courts for the transparent cheat attempted by bringing the two suits in an inferior court, which clearly did not have

---

Opinion of the court.

---

jurisdiction, the plaintiff having but one demand in point of law, even though he held two notes. It was not error to consolidate the two suits; this should have been done by the magistrate, and the suit dismissed for want of jurisdiction.

3. The claimants were entitled to the goods, the right of stoppage *in transitu* being intact. The contract of sale was not absolute, but voidable and relievable, both at law and in equity. *Martin v. McCormick*, 4 Sandf., (N. Y.), 366; *Ketchum v. Catlin*, 21 Vt., 191; *Wood v. Scarth*, 1 Foster & Fin., 293; *Luce v. Izod*, 25 L. J. Eq., ch. 307; *Milnes v. Duncan*, 6 Barn. & Cress., 671; *Kelly v. Solari*, 9 Mees & W., 54; *Gratz v. Redd*, 4 B. Mon., 178. It was competent for the vendors to protect themselves by refusing to deliver the goods, the vendee after the purchase having become insolvent. *Hunter v. Talbott*, 3 S. & M., 761; 2 Kent's Com., 493. The condition precedent to the contract of sale and delivery was, the acceptance of the bills drawn by the vendor upon the vendee, and until the bills were *accepted*, the *property* did not vest in the vendee even on delivery, and the right continued in the vendor even against the creditors of the vendee. *Payne v. Shadbolt*, 1 Camp., 427; *Carleton v. Sumner*, 4 Pick., 516; *Smith v. Dennie*, 6 Pick., 262; *Fleeman v. McKean*, 25 Barb., 474; *Lord Seaforth's case*, 19 Vesey, 235; *Russel v. Miner*, 22 Wend., 661; *Sargent v. Metcalf*, 5 Gray, 306; *Corlies v. Gardner*, 2 Hall, 345.

PEYTON, C. J., delivered the opinion of the court.

The material facts of this case, as presented by this record, are, that V. L. Sanders & Co., a mercantile firm, located and doing business in the town of Greenville, in the county of Washington, in this state, were indebted to one M. Morris, in the sum of \$251.98, as evidenced by their two promissory notes, one dated January 15, 1873, for \$112.70, payable thirty days after date, the other, dated 1st of February, 1873, for \$139.28, and payable thirty days after date.

On the 5th day of March, 1873, the said M. Morris sued out

---

Opinion of the court.

---

before one J. L. Griffin, a justice of the peace of said county of Washington, two several writs of attachment on said notes against the estate of M. R. Sanders, as surviving partner of the said firm of V. L. Sanders & Co., returnable into said justice's court, which were levied by the sheriff of said county on the same day on thirty packages of goods, wares and merchandise on the wharf-boat at the said town of Greenville, as the property of the said M. R. Sanders as surviving partner as aforesaid. And the officer levying said attachments, being of opinion that the goods and chattels levied on are perishable property, and in danger of immediate waste and decay, sold the same for the sum of \$296.70, of which sum, after paying freight, charges and sheriff's fees, he holds in his hands the sum of \$242.75, subject to the order of the court.

Upon issues joined on pleas in abatement, filed by the defendant in the attachments, traversing the truth of the alleged causes for which said attachments were sued out, the jury found the issues for the defendant, and that the attachments were wrongfully sued out, and assessed his damages, by reason thereof, at \$258.90. Whereupon the plaintiff moved the court for a new trial, which motion was sustained by the justice of the peace and a new trial granted. From this ruling of the court in granting a new trial the defendant in attachments brings the cases to the circuit court of said county, on the 7th day of March, 1873, by writ of certiorari.

And on the 8th day of March, 1873, the defendants in error, Shryock and Rowland, merchants of St. Louis, Missouri, interposed a claim to the property on which said attachments were levied, and their claim was sustained by the jury at the next December term of said circuit court, and judgment rendered in their favor for the possession of said property. And from this judgment the plaintiff below prosecutes this writ of error.

The main questions presented by this record for our consideration in disposing of this case are three: 1. Did the justice of

---

Opinion of the court.

---

the peace have jurisdiction of the attachment suits? 2. Had the circuit court upon the return of the certiorari a right to try the causes anew on their merits, and try the right of property? 3. Did the levy of the attachments displace the lien of the defendants in error, arising from their right, as vendors of the goods, of stoppage *in transitu*?

With respect to the first question involving the jurisdiction of the justice of the peace, it will be seen, by reference to the twenty-third section of the sixth article of the constitution, that the civil jurisdiction of justices of the peace is limited to causes in which the principal of the amount in controversy shall not exceed the sum of one hundred and fifty dollars. In this case, at the time the attachments were sued out the record shows that the defendant was indebted to the plaintiff therein, in the sum of \$251.98, which constituted, in the language of the constitution, the principal of the amount in controversy between the parties. And if the law, to prevent a multiplicity of suits and unnecessary accumulation of costs, prohibits a plaintiff from dividing his claim, so as to bring it within the jurisdiction of a justice of the peace, the justice in this case had no jurisdiction. And this, we think, is settled by the former adjudications of this court in the cases of Grayson v. Williams, Walker, 298, and Schofield v. Pensons, 4 Cushman, 402. In the last mentioned case, the plaintiff below, on the 13th of May, 1850, held three notes against the defendant, one for \$50, another for \$44, and the third for \$3.60. On that day he brought suit before one justice of the peace of Adams county on the note for \$50, and on the same day another suit on the other notes before another justice of the peace of the same county. Judgments having been rendered by each justice of the peace for the plaintiff, the defendant prosecuted an appeal to the circuit court of said county, when the court, upon motion, dismissed both suits for the want of jurisdiction in the justices of the peace to render the judgments. The jurisdiction of justices of the peace was at that time limited to causes in which the

---

Opinion of the court.

---

principal of the amount in controversy shall not exceed fifty dollars. In that case the court say: "The principal sum of these notes is \$97.60, and this was the amount in controversy, because it was what the plaintiff claimed, and what the defendant refused to pay. It is then clear, that the claim was one of which a justice of the peace could take no jurisdiction whatever. If the law forbids the plaintiff from dividing his claim and suing before different justices of the peace at the same time for sums within their jurisdiction, *a multo fortiori* does the prohibition apply where the suits are brought before the same justice of the peace at the same time, as in the case under consideration. This doctrine commends itself to our adoption as founded in good reason and sound policy.

The next question is, Had the circuit court jurisdiction upon the return of the *certiorari* to try the causes *de novo*, and to try the right of property? Section 1336 of the Code of 1871 provides that when any cause is removed by *certiorari* to the circuit court, the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings. And in case of affirmance of the judgment of the justice, the same judgment shall be given as on appeals. In case of a reversal, the circuit court shall enter up such judgment as the justice ought to have entered, if the same is apparent, or may then proceed to try the cause anew on its merits. There was no final judgment of the justice of the peace which could be brought into the circuit court, either by appeal or writ of *certiorari*. Even if the justice had the legal right to set aside a verdict and grant a new trial, it would only be an interlocutory order in the progress of the cause, and not such a judgment as could be removed to the circuit court by either of the modes above mentioned. But the justice had no power to set aside the verdict and grant a new trial. Where there is a verdict in the justice's court in a case in which he has jurisdiction, it is his duty to enter judgment on such verdict. His action in granting a new trial of the issue

---

Opinion of the court.

---

which had been passed upon by the jury was simply void, and could furnish no ground for carrying the cases to the circuit court. The circuit court has no power to retain the suits and try them upon their merits for another reason, that the justice of the peace had no jurisdiction of them. The jurisdiction of the circuit court, in cases originating before a justice of the peace, must be regulated and determined by the jurisdiction of the justice. *Glass v. Moss*, 1 How., 520. In other words, in cases taken by appeal or *certiorari* to the circuit court from a justice of the peace, the circuit court only acts as an appellate court, and has no other jurisdiction than such as the justice had. *Crapoo v. The Town of Grand Gulf*, 9 S. & M., 205.

This brings us to the third and last question proposed to be considered in this case, in the solution of which it becomes necessary to determine the legal effect of the levy of the attachments upon the right of the defendants in error, as vendors of the goods levied on, to stop them *in transitu*, upon the hypothesis that the justice of the peace had jurisdiction of the attachment suits.

The right to stop goods *in transitu*, though first introduced and founded in equity, has long been considered and acted upon as a legal remedy. The courts of law, admitting the justice of the right, have recognized it in constant practice and extended a liberal aid in enabling an unpaid consignor or vendor to regain possession of property on its way to a vendee, who, from his circumstances, may not be in a condition to fulfill the terms of his contract. What was formerly a mere equitable claim is now, therefore, a legal possessory right. This right is nothing more than the extension of the lien which the vendor has on all sales for the price until after the delivery, to the very point of the goods coming to the actual custody of the vendee or his agent. The vendee may defeat the right of the vendor to stop the goods *in transitu* by a *bona fide* assignment of the bill of lading for value. And we are not aware that the right can be defeated in any other



---

Opinion of the court.

---

mode, until the goods come to the virtual possession of the vendee. The earliest instance found of the recognition of this right in a court of equity, is the case of *Wiseman v. Vandeput*, in 2 *Vernon*, 203. The benefit which was expected to result to trade from the allowance of the right and apparent injustice of permitting the goods of a consignor, in the event of the consignee's bankruptcy, to be applied in payment of the other creditors of the latter, induced the courts of law to follow the example of the courts of equity, and to adopt, and by a variety of decisions to establish the right of stoppage *in transitu* as a legal right, and upon the same principles of justice it has since been looked upon both by courts of law and equity as a right to be favored and encouraged. *Cross on the Law of Lien*, 263.

In the case under consideration, the actual shipment of the goods to the vendees, by their order, constituted a good contract of sale, and a good constructive delivery, so as to vest the property in the goods in the vendees, and place them at their risk. But though this proceeding vested the property in the consignees, it was subject to the well established right of the vendors to stop the goods *in transitu*, in case they were sold on credit, and the consignees became insolvent. This right may be exercised at any time before the goods reach their ultimate destination, and come to the possession of the consignees. And the consignors have a right to judge for themselves of the danger of such insolvency, and to take measures to guard against it by stopping the goods in their transit to the vendees, should their insolvency occur before the goods come to the possession of the consignees. The effect of such stoppage *in transitu* is not to rescind the contract, but to reinstate the vendors in their lien and right to hold the goods in security for the price. *Stanton v. Eager*, 16 *Pick.*, 473; *Buckley v. Furniss*, 15 *Wend.*, 137; *Naylor v. Dennie*, 8 *Pick.*, 198; *Hays v. Mouille*, 2 *Harris*, 48; *Cox v. Burnes*, 1 *Clarke (Iowa)*, 64; and 4 *ib.*, 480; 17 *Wend.*, 504.

In a late case, *Harris v. Hart*, 6 *Duer*, 606, this subject is dis-

---

Opinion of the court.

---

cussed with great ability by a court of large experience and learning in commercial law, and an attempt is made to rescue the principle upon which all the cases profess to go, from something of that confusion into which some of the modern cases have thrown it. The principle upon which the whole subject rests is, that of giving the vendor a lien for the price of the goods until they come into the actual possession of the vendee or of his agent, for custody, and not for transportation. With this view, all reasonable construction should be in favor of maintaining the lien.

In the case at bar, the vendees have neither conveyed the goods to *bona fide* purchasers for value, nor received them into their possession; but, on the contrary, under the influence of an honest impulse, actually refused to receive them, and that before the attachments were levied upon the property. And in this, finding that they were insolvent, they acted as honest men in declining to receive goods they could not pay for, and in immediately informing their vendors of that fact.

The adjudications upon this subject, notwithstanding some conflict in them, tend to this result, that a merely constructive delivery, though sufficient to entitle the vendor to demand the price of the goods, and to place them at the vendee's risk, does not defeat the right of stoppage. That while the goods are in course of transportation to the place of destination, or are in the hands of an intermediate agent or warehouseman for the purpose of being forwarded, they are subject to this right. That after their arrival at the place of destination, and while in the hands of the carrier or wharfinger or warehouseman, for the mere purpose of delivery to the vendee, the vendor may resume the possession. But the right is lost if the vendee receive actual possession; or, if after their arrival at the place of destination, he exercises acts of ownership over the goods; or his agent, having authority and power of disposal, exercises like acts. The transit continues until the goods come to the possession of the vendee or of some agent authorized to act in respect to the disposition of them, otherwise than by forwarding them to the vendee.

---

Opinion of the court.

---

Nothing short of a *bona fide* sale of the goods for value, or the possession of them by the vendee, can defeat the vendor's right of stoppage *in transitu*. And hence it has been held that an assignee in trust for creditors of the insolvent vendee is not a purchaser for value, and consequently takes subject to the exercise of any right of stoppage *in transitu* which may exist against his assignor. *Harris v. Pratt*, 17 N. Y., 249.

The right of stoppage is held not to be divested, though the goods be levied on by execution or attachment, at the suit of a creditor of the vendee, provided it be exercised before the *transitus* is at an end. The vendor's lien has preference; it is the elder lien, and cannot be superseded by execution or attachment. *Smith v. Goss*, 1 Campb., 282; *Buckley v. Furniss*, 15 Wend., 187; *House v. Judson*, 4 Dana, 11; *Wood v. Yeatman*, 15 B. Monroe, 270; and 2 Kent, 550.

In the case of *O'Brien v. Norris*, 16 Md., 122, it was held that the vendor's right of stoppage *in transitu*, existing at the time of an attachment laid on the goods is not defeated or impaired by the attachment, nor altered by the sale of the goods by an order of court. *Naylor v. Dennie*, 8 Pick., 199; *Butler v. Woolcot*, 2 New Rep., or 5 Bos. & Pul., 64; *Nicholas v. Lefeuivre*, 2 Bing. (N. C.), 83, and *Hays v. Mouille*, 14 Penn. State, 48.

From the facts and circumstances of this case, as disclosed by the record, we think the right of stoppage *in transitu* existed at the time of the levy of the attachments, and that the filing of the claim to the property was a sufficient exercise of that right.

The defendants in error have a right to recover the value of the goods in an action of trover, or they may waive the tort, and recover the proceeds of the sale thereof in an action of assumpsit.

As the justice of the peace had no jurisdiction of the case, the circuit court could have none, and therefore it was error in that court to assume to try the cause upon its merits.

For this reason, the judgment must be reversed, and this court proceeding to render such judgment as the circuit court ought to

---

Syllabus.

---

have rendered, doth order and adjudge that the attachment suits be dismissed for the want of jurisdiction in the justice of the peace, at the costs of the plaintiff.

---

METHODIST EPISCOPAL CHURCH SOUTH, OF VICKSBURG v. MAYOR  
AND ALDERMEN OF VICKSBURG.

50	601
96	725

1. CORPORATIONS — LIABILITY — IMPLIED CONTRACT. — At common law a corporation could not manifest its intentions by any personal act or oral discourse, and that it spoke and acted only by its common seal. This rule has been relaxed and corporations can now be bound by contracts made by their agents, though not under seal, and also on implied contracts, to be deduced by inference from corporate acts, without either a vote or deed or in writing. The doctrine of implied municipal liability to all cases where money or property of a party is received under such circumstances, that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city receives money or property which does not belong to her, it is her duty to restore it to the true owner, or if used by her, to render an equivalent to the true owner; from the like general obligation, the law, which always intends justice, implies a promise.
2. SAME — IMPLIED CONTRACT BY AN AGENT OR SERVANT. — When it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation. If the corporation appoints or elects them and can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may be justly regarded as its agents or servants, and the *maxima of respondeat superior applies*. 2 Dillon, 772.

ERROR to the Circuit Court of Warren County. Hon. GEO. F. BROWN, Judge.

Plaintiff in error brought suit in the circuit court of Warren county at the June term, 1869, thereof, to recover one thousand

---

Brief for defendant.

---

dollars, the value of six thousand brick, alleged to have been taken and used by the defendant. The case was tried at the December term, 1872, and resulted in a judgment in favor of defendants, and the case comes to this court on writ of error.

The following is assigned for error, to wit:

1. The circuit court erred in sustaining defendant's objections to the statements of M. Murphy, and also the statements of Mayor Crunp.

2. The court erred in giving judgment for defendants upon the evidence.

3. The court erred in refusing motion to grant a new trial.

*M. Marshall*, for plaintiff in error, filed an elaborate printed brief.

*Buck & Clark*, for defendant in error:

The manner in which the plaintiff sought to arrive at this as a proper charge against the city, was *neither certain* nor capable of being rendered so. They took the measurement of the building as it stood, not allowing for openings, and then calculated that this number of sound brick remained after the burning, then calculated that the city carts got them all in 1862, five or six years after the church was destroyed by fire. No witness did or could state how many bricks were removed by the city carts. We cannot see how the judge or jury could determine upon such vague and hypothetical statements, what, if any, claim plaintiff had against the city.

Notwithstanding the character of the parties to this litigation, the plaintiffs are entitled to no special indulgence. The trustees of the church (as shown by the testimony) knew that bricks were being removed from their lot by the city carts, and if they had regarded it worth the trouble, they might have secured from the mayor or superintendent of the street hands an agreed statement of the number and value of the brick used, and had the account up-proved by the city council.

The city charter of 1839 shows no authority in the mayor of

---

Brief for defendant.

---

the city without the sanction of the board of council, to make the city liable, by the removal and use of the brick ; no such sanction of an affirmative character is asserted, and the evidence indicates that there was none.

We understand the rule to be well settled, that a municipal corporation can be held liable upon an implied contract in any proper case. Two facts, however, are essential to liability in such cases.

1. That the property, the value of which is sought to be recovered, was used by the city.
2. That such use was made, with the assent or under the authority of the corporate body having control in the matter.

We insist that there is no evidence showing that the brick sued for was used for city purposes, or if so used, that the city council authorized or sustained it. *Argenti v. San Francisco*, 16 Cal., 255 ; *Crawshaw v. City of Roxbury*, 7 Gray, 374.

*Upton M. Young* on the same side :

It is quite well settled that the officers of a municipal corporation cannot bind it beyond the scope of its powers, or in any way not authorized by the terms of the charter. Persons dealing with corporations are bound to know the extent of the powers conferred by the law creating them, and the moment a municipal corporation is, by the legislature, created, that instant those intending to make a contract with it are put upon inquiry. Were this not the case, the early destruction of all city governments would be the result. *Leavenworth v. Rankin*, 2 Kan., 358. If this court were sitting as a jury, could it render a verdict, and upon what theory ? How many bricks went to the gutters ? How do we conclude that 60,000 bricks were purchased by Crump, who had no authority to purchase one ; but he had well known power to remove obstructions to the public streets, because all charters expressly give that power to municipal corporations. The rule of law seems to be, in cases like the one at bar, that evidence of the assent of a corporation must be given, although such evidence is

---

Opinion of the court.

---

not required to be great. Where the contract appears to be fair on its face, free from all fraud, and clearly shown to be useful, this assent must be that of the body corporate, and not that of a single member. A corporation can make no contract which is not expressly authorized by its charter, or necessarily incident to the purposes of its creation. Angell & Ames on Corporations, p. 200; Bacon et al. v. Miss. Ins. Co., 2 George, 116; 2 Kent's Com., 298; 7 How., Miss., 580. The authorities cited contemplate contracts, as such and not those attempted to be made, by individuals, who happen to be members of corporate organizations. A corporation when sued, even on a contract made by it, may deny its power to make such a contract. 12 U. S. Digest, 132, §§ 26, 28. The authority of even a board of trustees is subject to a strict construction. 2 Cowen, 419; Story on Agency, § 68. Applying the principles stated to the facts of this case, we perceive no error in the action of the court below. The action of Crunp, mayor, was never ratified by the corporate authorities of Vicksburg.

PEYTON, C. J., delivered the opinion of the court :

The plaintiffs in error sued the defendants in the circuit court of Warren county, in an action of assumpsit to recover the value of 60,000 bricks alleged to have been sold and delivered by the plaintiffs to the defendants.

To this action the defendants appear and plead the general issue, non assumpsit. And upon issue taken upon this plea, the court found for the defendants. Whereupon the plaintiffs moved the court for a new trial on the following grounds :

1. Because the finding is contrary to law and evidence.
2. Because the court erred in not permitting evidence to be given of the statements made by M. Murphy, the overseer of the street work, which motion was overruled by the court, and new trial refused, and to this action of the court the plaintiffs excepted, and bring the case into this court by writ of error.

It was an ancient and technical rule of the common law, that a

---

Opinion of the court.

---

corporation could not manifest its intentions by any personal act or oral discourse, and that it spoke and acted only by its common seal. This rule has since been relaxed, and corporations can now be bound by contracts made by their agents, though not under seal, and also on implied contracts to be deduced by inference from corporate acts, without either a vote or deed or in writing. This doctrine is generally established in this country with great clearness and solidity of argument; and the technical rule of the common law may be considered as being in a very great degree done away in the jurisprudence of the United States. 2 Kent, 348, top page. The English law is more strict on this subject. The general rule is still understood to be, that a corporation, though created by statute, cannot express its will except by writing, under the corporate seal. To this general rule there are certain excepted cases as follows: 1. Where the acts done are of daily necessity, or too insignificant for the trouble of a seal. 2. Where the corporation has a head, as a mayor, who may give commands. 3. Where the acts to be done must be done immediately, and cannot wait for the formalities of a seal, and 4. Where it is essential to a moneyed institution that they should have the power to issue notes and accept bills. *East London Waterworks v. Bailey*, 4 Bing., 288.

The doctrine of implied municipal liability applies to all cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake or without authority of law, it is her duty to refund it, not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner, from the like general obligation, the law, which always intends justice,



---

Opinion of the court.

---

implies a promise. As a general rule, undoubtedly, a city corporation is only liable upon express contracts authorized by ordinance or other due corporate proceedings. The exceptions relate to liabilities from the use of money or other property which does not belong to her, or to liabilities springing from the neglect of duties imposed by the charter, from which injuries to parties are produced. *Argenti v. San Francisco*, 16 Cal., 255; 1 *Dillon on Municipal Corporations*, 476, sec. 384.

In *Seagraves v. Alton*, 13 Ill., 371, the court held that a contract was implied on the part of a city, which was bound to support its paupers, and which had refused to pay a person who had furnished a pauper with necessities. Here it will be noticed that there was an express refusal on the part of the city to support the pauper, and yet a promise was *implied*. This implication is a pure fiction to support what the court regarded as a just claim.

It may be observed, that when it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation. If the corporation appoints or elects them, and can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust; and if those duties relate to the exercise of *corporate* powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and *the maxim of respondent superior applies*. 2 *Dillon*, sec. 772.

It appears from the statement of E. G. Cook, which was read in evidence, that the mayor and aldermen decided to use the bricks of the burnt church for the city work, and would return the same number when called for, or pay the market value at that time. The evidence establishes the fact, that some of the bricks were used for making culverts and for other city purposes by the direction of the mayor of the city, and under the superintendence of Murphy, who was the city overseer of the streets.

---

Syllabus.

---

These were agents of the corporation, whose statements, under the circumstances, should have been received in evidence. The court erred, therefore, in rejecting them.

Upon the whole, we think the plaintiffs were entitled to recover from the defendants the market value of the bricks used for city purposes at the time they were taken and appropriated.

The judgment will be reversed and the cause remanded for a new trial.

---

M. C. BRADY, Dist. Att'y, ex rel. v. W. W. HOWE.

1. **POWER OF THE GOVERNOR TO APPOINT CHANCELLORS.** — Chancellors shall be appointed in the same manner as the judges. Judges of the circuit court shall be appointed by the governor, with the advice and consent of the senate. The appointment by the governor, without the advice and consent of the senate, would not confer a right to the office. Where the constitution has provided a mode for filling vacancies in particular offices, that is the exclusive mode, and the legislature can prescribe no other. In county offices, the vacancy shall be filled by an election which shall be ordered by the board of supervisors. To fill a vacancy in the office of chancellor, the senate must share with the governor the duty and responsibility of the appointment. When the senate is in session, and the term of a chancellor is about to expire, and will expire by limitation before the next session of the senate, the governor should nominate a person to fill the vacancy and send his name to the senate for their concurrence; and if he fails to do so, he cannot make a valid appointment, to fill such vacancy in the vacation of the senate; that would be to limit and abridge the right of the senate to advise and consent to the appointment of the officer.
2. **SAME — REMOVAL FROM OFFICE.** — The governor has no authority to revoke an appointment, and treating that revocation as creating a vacancy, fill the office by the appointment of another person. The constitution does not intend that the executive appointee to a chancellorship is tenant of the office at the governor's sufferance, and is removable at his pleasure.
3. **SAME — DE FACTO OFFICER.** — C. was appointed chancellor in the vacation of the senate, to fill a vacancy caused by the expiration of a full term: *held*, that the appointment was void; but for the repose and quiet of society,

---

Syllabus.

---

he is constituted *de facto* chancellor, and imparted virtue and validity to his judicial acts. A *de facto* officer is competent to do whatever a *de jure* officer may do, this prevents a failure of justice and avoids confusion.

4. SAME — APPOINTMENT OF A CLERK. — It pertains to a chancellor to appoint a clerk, under certain circumstances, and when these circumstances exist, a *de facto* chancellor exerts the power with the same right that he may render a decree, or punish for contempt. The statute makes provisions for the chancellor to make an *ad interim* appointment of clerk until the office can be filled by an election, but it would be a palpable evasion of the constitution, if the board of supervisors should refrain from ordering an election to the end that such an appointee might enjoy the residue of the time of his predecessor. The legislature could not provide for the filling a vacancy that happens by casualty, otherwise than by an election. The statute does not authorize the chancellor to fill the office for the balance of the term; he can assign a person to discharge the duties of the office until an election can be held.
5. SAME — ELIGIBILITY TO OFFICE — PERSONS LIABLE FOR PUBLIC MONEYS UNACCOUNTED FOR — CONST., ART. 4, SEC. 16. — No person liable for public moneys unaccounted for shall be eligible to any office of profit or trust until he shall have accounted for and paid over the same. C., chancellor, appointed H. clerk of the chancery court of Panola county; a petition was filed against H. in the nature of *quo warranto*, alleging that he was liable for public moneys; that he did receive large sums of money as treasurer of Panola county, for which he has not accounted and paid over, but still is liable therefor. He insisted that the default must have been judicially ascertained and fixed before the liability accrues: *held*, that this was not essential; that the question of his liability for moneys unaccounted for can be inquired into as fully and as thoroughly in a proceeding in *quo warranto* as in any form of civil action, or as in the trial of an indictment. The ineligibility arises from the receipt, detention and failure to account for and pay over the money. It is not a permanent disability to hold office, but temporary, continuing so long as the public funds are unlawfully detained, and ceasing when paid over. The question was, did H. owe and detain unlawfully the money at the time he was appointed. If so, he was ineligible, not upon the conviction of the misdemeanor, and the proceeding in *quo warranto* is not to inquire into the misdemeanor, but into the rights of the respondent to continue in the office.

ERROR to the Circuit Court of Panola County. Hon. E. S. FISHER, Judge.

---

Statement of the case.

---

This was an information in the nature of *quo warranto*, filed by M. C. Brady, district attorney, against William W. Howe, to inquire by what authority he holds and uses the office of clerk of the chancery court and clerk of the board of supervisors of Panola county.

The information assigns two grounds why defendant does not lawfully hold said offices, to-wit: 1. That the defendant was never legally elected or appointed to the said offices; and, 2. That said defendant, while treasurer of Panola county, during the years 1872 and 1873, unlawfully retained to his own use and for his own benefit, large sums of public money, which said sums the said defendant never accounted for or paid over, but is still liable for. To the first assignment, the defendant filed an answer, to the second he demurred, upon the ground that the information did not disclose that there was any judgment by a court of competent jurisdiction against him for said public moneys, which demurrer the court below sustained.

The answer to the second assignment, sets up the fact that there was a vacancy in the office of chancery clerk of Panola county, caused by the death of the late incumbent; and that said W. W. Howe was appointed to fill said vacancy, by Hon. J. N. Campbell, chancellor, and had been commissioned by the governor, and given bond and qualified according to law. To this answer, the district attorney demurred upon the ground that said chancellor had no constitutional power to make such appointment. This demurrer was overruled, and the district attorney replied to the answer, setting up the fact that said J. N. Campbell was not chancellor, nor acting as such at the time he appointed said W. W. Howe, clerk; but that J. F. Simmons was the legally qualified and acting chancellor of said district at the time of said appointment.

The case was finally tried upon the issue of fact thus made, upon an agreed state of facts, to-wit:

On July 17, 1874, there being a vacancy in the office of

---

Statement of the case.

---

chancellor, Lieut. Governor Davis (acting governor) re-appointed Simmons chancellor; Simmons accepted and qualified, took leave of absence and returned to the state about the 10th day of October. During his absence, Governor Ames revoked his appointment, and about the time he returned to the state, Governor Ames appointed J. N. Campbell. Simmons never recognized the governor's power to revoke his appointment, but still claims to be chancellor. He did not hold the succeeding terms of the court for the reason that he understood that it was the opinion of the bar, that an attempt by him to hold the courts, would produce unnecessary litigation; but particularly for the reason that his resignation had been placed in the hands of a third party to be tendered to the governor upon the condition that the governor would withdraw his letter of revocation, and at the time the chancery court of Panola county should have been held, he did not know but what his resignation had been tendered to and accepted by the governor.

His letter of resignation was not returned to him until after Campbell had held the court at Panola. Campbell had held the various courts, up to the filing of the information. On November 15th, Campbell appointed Howe, the respondent, to the office of chancery clerk, and he immediately qualified, and has ever since been acting as such clerk. This appointment was made in vacation.

On this state of facts, the court below held the respondent *prima facie* entitled to the office and dismissed the information, to which the relator excepted, and now brings the case to this court, and assigns for error:

1. The said circuit judge erred in sustaining the demurrer of respondent to the second count of the information.

2. The said circuit judge erred in refusing to render judgment of ouster against said respondent upon trial of the issue of facts made by the said information, the respondent's answer to the first count thereof, and the replication of relator to said answer.

---

Brief for plaintiff.

---

*R. H. Taylor & J. G. Hall*, for plaintiff in error :

The question presented by the first assignment of error, is whether or not it is essential to the maintenance of a *quo warranto*, under sec. 16, art. 4 of the constitution, that there should be an adjudication against the respondent for the recovery of the public funds for which he is alleged to be liable. The only thing required to render a person ineligible under this clause, is that the person shall be "liable for public moneys unaccounted for." If this liability exists before as well as after a judgment, then respondent is brought clearly within the terms of the constitution and was ineligible from the moment he wrongfully detained public funds. Words in the constitution will be used in their usual and ordinary sense. *Cooley Const. Lim.*, p. 58, 59, and cases cited. The legislature may, if deemed expedient, by law declare such withholding of public funds, a crime or a misdemeanor, and super-add pains and penalties. But whether this be done or not, cannot affect the internal force of the constitutional provision. Imbedded as it is in the very groundwork of the government, it works out its own ends without any extraneous aid, and is above any and all the branches of the state government. *Green v. Robinson*, 5 How., 80; *Brien v. Williamson*, 7 How., 14; *Morgan v. Vance*, 4 Bush., 323. It has been held that the constitution should not be so construed as to cripple the government. *Cooper v. Moore*, 44 Miss., 391. The second assignment of error presents a grave question, and must be considered in view of the admitted state of facts, all technical objections being waived by the acceptance of the issue and the trial upon those facts. If respondent is rightfully in office, that right must have been derived from a source competent to bestow the right, not only with all the *indicia*, but with every right belonging to an officer *de jure*. Refer to the facts in the case. The first point arising upon this state of facts, is the power of the governor to revoke an appointment once regularly made, and to appoint another person to the same office. Cited *Rev. Code of 1871*, § 106. Respondent must show by what war-

## Brief for defendant.

rant he holds his office, and he traces his title to that office through this *de facto* chancellor. He must then show the validity of his appointment. No presumption can be indulged in his favor, but he must show, in every respect, that he has been legally inducted into office, and still legally holds the same. The People v. Mayworm, 5 Mich 149; State v. Beecher, 15 Ohio, 723; People v. Phillips, 1 Denio, 388; State v. Harris, 3 Pike, 570; State v. Ashley, 1 Pike, 513.

L. P. Cooper, on the same side, filed an elaborate brief and argument, urging, substantially the same points, as his associate counsel, citing the following authorities: Const. of Miss., art. 5, sec. 17; Const. of Miss., art. 6, sec. 11, 17; Code of 1871, p. 33, § 106; Alcorn v. Shelby, 7 George, 273; 1st Ark. Rep'ts, 513; 3d Ark, 570; Newsom v. Cocke, 44 Miss., 352; Ex parte Henuaw, 13 Peters, 230; 13 Curtis, 135, and cases cited; 2 Bouvier Law Dic., p. 41, defines "liability;" Angell & Ames on Corp. (5 ed.), 832.

*Miller & Miller*, for defendant in error:

1. Has a chancellor in this state the power to fill, by appointment, a vacancy in the office of chancery clerk?

2. In a *quo warranto* proceeding against a chancery clerk who holds his office under an appointment from the chancellor, can the title of the chancellor to his office be inquired into?

3. In a *quo warranto* proceeding against one in possession and discharging the duties of a public office, upon the grounds of his "liability for public moneys unaccounted for," can there be a judgment of ouster until there has been first an adjudication fixing the liability in a court of competent jurisdiction?

The first question is answered by the Rev. Code of 1871, § 983, in the affirmative.

The second question is answered in the negative. Campbell was in the office, exercising the function of it. If Simmons had any claim to the office, he had abandoned it, as shown by the facts in the case. The power to appoint belongs to the governor. Const., art. 6, secs. 11, 17. The exercise of this power of

## Brief for defendant.

appointing to office, implies the exercise of discretion, prudence and *deliberation*, and is not included by the spirit, scope and object of the law within those "duties," conferred upon the lieutenant governor by art. 5, sec. 17 of the constitution. But Campbell, at all events, was chancellor *de facto* if not *de jure*, and his appointment of defendant was as valid as all his other acts. Code 1871, § 317. Be this as it may, his title to the office of chancellor, and by virtue thereof his right to appoint, cannot be collaterally questioned. Freeman on Judgment, § 148; Cooper v. Moore, 44 Miss., 386; Commonwealth v. McComb, 56 Penn. St., 436; Rice v. Commonwealth, 3 Bush. (Ky.), 14; 70 N. Carolina, 351; Moore v. The State, 5 Sneed, 510; Satterlee v. San Francisco, 23 Cal., 314; Commonwealth v. Green, 58 Penn. St., 226.

The third ground, can an officer be removed upon the ground of his *liability for public moneys unaccounted for*, unless there be first an adjudication of his liability in another court, we answer in the affirmative.

We further submit that in this proceeding, which is extremely summary, may be had before the circuit judge in vacation, and when carried to the supreme court, it may there be tried in vacation.

We submit further, that the defendant Howe, in this *quo warranto* proceeding, could not have been a witness, and therefore could not be heard to repel the evidence against him of liability; and the trial of the cause is the same as in criminal prosecutions. Rev. Code, 1871, § 1504.

*Powell & Johnston*, on the same side, filed an elaborate brief. It is insisted:

1. That a chancellor has no legal authority under the constitution and laws of the state, to fill such vacancies. Const., art. 12, sec. 7 provides, that in all cases not otherwise provided for in this constitution, the legislature may determine the mode of filling the vacancies in all offices.

Sec. 20, art. 4 of the constitution, provides that the board of supervisors shall order all county elections to fill vacancies that



---

Opinion of the court.

---

may occur in the offices of their respective counties. Revised Code 1871, § 983. Should the office of the clerk of the chancery court become vacant \* \* \* the chancellor may appoint a clerk \* \* \* until said officer is able to perform his duties, or until a successor is elected and qualified. There is no conflict between this section of the code, and art. 6, sec. 20 of the constitution. The article in the code supplies the means of filling the office during the term when the vacancy occurs, and the election and qualification of the successor under the orders of the board of supervisors.

2. It is insisted that J. N. Campbell was not chancellor; that his appointment to said office by Governor Ames was a nullity, because the vacancy had been filled by the appointment of J. F. Simmons.

It has been held by this court, that the power to appoint carried with it the power to remove. *Cocke v. Newsom*, 44 Miss., 352. He was in possession of the office, and was *de facto* chancellor. *Blackburn v. The State*, 3 Head, 691; *Cooper v. Moore*, 44 Miss., 386.

3. That appellee, W. W. Howe, was liable for public moneys unaccounted for. To this he demurs, because said information does not allege that said liability of defendant was adjudicated or established by a court of competent jurisdiction. The demurrer was sustained. See Const., art. 4, sec. 16.

SIMBALL, J., delivered the opinion of the court.

This was a proceeding by information in the nature of *quo warranto*, challenging the right of the respondent, William W. Howe, to the office of chancery clerk of Panola county, and *ex officio* clerk of the board of supervisors.

Two specific grounds are set forth in the information why the respondent does not legally hold the office.

First. That he was neither legally elected nor appointed thereto.

Second. That while treasurer of Panola county, during the

---

Opinion of the court.

---

years 1872 and 1873, he unlawfully retained to his own use, and for his own benefit, large sums of money, to wit: \$554.32 of the common county fund, and \$1,605.63 of the school funds of the county, for which sums of money he is still liable, and has never accounted for and paid over, etc.

To the first assignment, the respondent filed an answer; to the second, he demurred.

In the answer, the respondent states that there was a vacancy in the office of chancery clerk \* \* \* caused by the death of the incumbent John C. Harrison, who had been duly elected, and that respondent was appointed to the vacancy by Hon. J. N. Campbell, chancellor of the 10th district, on the 16th of November, 1874. Harrison was elected for four years, from the 1st of January, 1872; his term would have expired on the 1st of January, 1876. The term of Hon. J. F. Simmons, as chancellor, expired on the 3d of June, 1874. On the 17th of July, the same year, the office being vacant, the lieutenant governor (on account of the absence of the governor), acting as governor, reappointed Simmons, and issued to him a commission, which was received by Simmons on the 18th of July, who qualified according to law on the 20th of July, and notified the acting governor of his acceptance, and asked and obtained leave of absence until the 10th of October, which was granted. Simmons left the state the 23d of July, and did not return until the 3d of October. In August, 1874, Governor Ames revoked the appointment of Simmons, and so notified him.

The regular term of the chancery courts in the district begun in Tallahatchie county the first Monday of October. The term in Panola county was the second Monday. J. N. Campbell presided at both terms.

It is said, first, that the appointment of Campbell is void, because there was no vacancy, the office having been already filled by Simmons, who was appointed by the lieutenant governor.

What is the constitutional mode of filling the office of chancel-

---

Opinion of the court.

---

lor? Chancellors shall be appointed in the same manner as the "judges of the circuit court," art. 6, sec. 17.

Judges of the circuit court shall be appointed by the governor, with the advice and consent of the senate. Art. 6, sec. 11. The appointing power is placed in the governor and senate. The initiation, that is, the selection of the person is with the governor, but the appointment must be with the advice and consent of the senate. If there were no other provision on the subject, it would not be doubted that the appointment by the governor alone would not confer a right to the office.

"All vacancies not provided for in this constitution shall be filled in such manner as the legislature may prescribe." Art. 5, sec. 13. If, however, the constitution has provided a mode of filling vacancies in particular offices, that is the exclusive mode, and the legislature has no power to prescribe any other. To the same effect is sec. 7 of art. 12. "In all cases not otherwise provided for in this constitution, the legislature may determine the mode of filling all vacancies in all offices." The 21st section of art. 6 furnishes an instance where the constitution itself prescribes the manner of filling vacancies in county offices, viz.: the board of supervisors "shall order all county elections, to fill vacancies that may arise in the offices of their respective counties."

So also does the fifth section of sixth article: "All vacancies that may occur in (supreme court) from death, resignation or removal, shall be filled by appointment, as aforesaid; *provided, however,* that if any vacancy shall occur during the recess of the legislature, the governor shall appoint a successor, who shall hold his office until the next meeting of the legislature."

If the constitution is silent, the manner of filling vacancies is remitted to the legislature.

It is very manifest that the senate shares with the governor, in the duty and responsibility of filling the judicial offices of the higher courts, and, since the judges of the supreme, circuit and chancery courts, hold for a definite term, the constitution intends

---

Opinion of the court.

---

that the appointments of the respective judges to their appropriate terms of nine, six and four years, shall be participated in by the senate. That purpose is carried out by section 106 of the code (1871): "The governor shall fill, by appointment, with the advice and consent of the senate, all *offices* subject to such appointment under the *constitution* and laws, when the *term* of the *incumbent* is *about to expire*." He shall do this in advance of the expiration of the term, so that the senate may, with him, do its duty under the constitution, in advising and consenting to the appointment. He must select such time, before the expiration of the term, for making the appointment, as that he may obtain their concurrence. The meaning is (since the senate only convenes periodically, unless by extraordinary convocation of the legislature), the governor shall make his nomination to that body, at a session immediately preceding the expiration of the term. That satisfies the intent of the words "about to expire." The idea is, that if the term of the judicial officer will come to an end before the next regular session of the senate, then the nomination shall be made to the body in session just before, or preceding such ending of the term. That is necessary in order that the appointment to a full term may not be made without the consent of the senate. The same idea is kept up (of requiring the concurrence of the senate) in the other clauses of the statute. "And also by the approval of the senate, all such vacancies occurring from any cause during the session of that body." Clearly the governor cannot appoint to a vacancy which happens during the session of the senate, without its concurrence unless, as provided in the last clause of the section, it took place during the last five days of the session; nor can he fill a vacancy caused by the refusal of the senate "to confirm any appointment or nomination."

Only when it is impracticable for the senate to unite with the governor, does the constitution and statute intend that the governor alone can make an appointment. The statute regulates the subject on that theory. First, if the office is *about* to be vacant by

---

Opinion of the court.

---

expiration of the term, the governor must send his nomination to the senate for its advice and consent. The impending vacancy will occur at a time certain, and is in no manner contingent. Second, if the vacancy, from any cause, takes place during the session of the senate, an appointment must be made by the governor and senate, unless it is covered by the last clauses of the section. After these specific directions, the section contains these general words: "And he (the governor) shall also appoint for all vacancies occurring from any cause in such offices during the vacation of the senate, and also all other vacancies not otherwise filled by law." "But such appointments shall be reported to the senate within ten days, after the commencement of the session for their approval," etc.

The preceding clauses had provided for two specific cases, to wit: First, "when the term was about to expire." Second, all such vacancies occurring from any cause during the session of the senate "whether by the ending of the term, or from casualty of death, resignation," etc. After these specific directions, then follow the general words above quoted, introduced by the adverb "also," which are designed to meet all other instances of vacancies than those enumerated. After the constitution had declared that judges shall be appointed by the governor and senate, what other effect can the 13th section of the 5th article have, than to authorize the legislature to prescribe how a vacancy, which happens before the term is out, shall be filled. Certainly it was not designed to limit or abridge the full and complete right of the senate to participate with the governor in conferring the office.

The general clause in the statute may be paraphrased thus: Since vacancies occurring in certain defined circumstances shall be filled as herein specifically directed, and since vacancies may arise in the vacation of the senate from several causes, as death, resignation, or from whatever cause it was brought about, if it has not been specially provided for in the preceding parts of this statute, then the governor may appoint, etc. When the statute had al-

---

Opinion of the court.

---

ready enacted that the governor, with the advice and consent of the senate, must fill a term about to expire; it would be unreasonable to construe the succeeding clause as partially repealing or modifying it, when the general language can have a full meaning and application, to a large class of vacancies brought about by contingencies.

Construing the 13th section of the 5th article as giving power to the legislature to regulate the filling of vacancies, whether arising from expiration of the term or from casualty, and giving to the several parts of the section 106 of the Code, such a rendering as will make it a harmonious unit; this rendering of the statute makes all the parts agree with each other, and conform to the letter and spirit of the constitution. First. A term of the chancellor, which will expire in the vacation of the senate, must be filled by a nomination by the governor to the senate, and a confirmation at the session preceding its termination. Second. Vacancies which arise from the ending of the term, or from casualty during the session of senate, must be *then* filled by the governor and senate, unless a vacancy (from contingent cause alone, perhaps), occurs during the last five days of the session. Third. If the senate refuses to confirm an appointment or nomination, the governor shall not fill such a vacancy in vacation, unless it happened within five days before the senate adjourned. But vacancies occurring in any other than these enumerated modes may be filled by appointment in vacation, which includes only such vacancies as happen in the recess of the senate, from casualty, as death, resignation, etc.

Since the constitution refers it to the legislature to regulate the filling of vacancies, where the constitution itself has not indicated a mode, it follows, that the appointing power must pursue the mode pointed out in the statute.

Was the appointment of the chancellor in the 10th district made in accordance with the constitution and statute? The term of Chancellor Simmons expired on the 2d of July, 1874. The

---

Opinion of the court.

---

constitution, in words so plain that there is no room for construction, declares that chancellors, like circuit judges, shall be appointed by the governor, with the advice and consent of the senate. The statute regulating the subject so that there may be concurrent exercise of the power, enacts, in effect, that at the session of the senate just preceding the end of the term, the appointment of the successor shall be made by the governor and senate.

To have conformed to the law, the governor ought to have asked the advice and consent of the senate to an appointment, at their session next preceding the 2d of July, 1874, when the incumbent's term expired.

What was the effect of the respective appointments made by the lieutenant-governor and governor in vacation? Lieut. Governor Davis, during the absence of the governor from the state, and while he was discharging the executive functions, on the — day of July, 1874, appointed the Hon. J. F. Simmons, chancellor, the office being then *vacant*.

The 17th section of the 5th article is to the effect, "that when the office of governor shall become vacant by death or otherwise, the lieutenant governor shall possess the powers and discharge the duties of said office." \* \* "When the governor shall be absent from the state \* \* the lieutenant governor shall discharge the duties of said office \* \* until the governor be able to resume his duties." In the first named contingency, the office is absolutely devolved upon the lieutenant governor. In the second, the duties of the office are temporarily to be performed by the lieutenant governor. There is nothing in the language or in the reason for the provision, which would confer part of the *duties only* upon him. The words are "duties of the office." That is all of them. If there had been an enumeration of some of them, that would have excluded all others.

If, therefore, the governor could have legally made the appointment, in his absence from the state, the lieutenant governor could have done so. The incumbent's term ended the 3d June, 1874

---

Opinion of the court.

---

On the 17th of July, the office being vacant, Lieutenant Governor Davis appointed. His appointee immediately accepted and qualified. It hardly admits of doubt that, under the permanent provisions of the constitution, that when the governor fills an office by appointment, in vacation of the senate, his whole power over the office is exhausted. That idea runs through the opinion of the court in *Newsom v. Cook*, 44 Miss., 360 et sequitur. The statute authorizing the governor to remove at pleasure certain officers therein named, was sustained, because of the anomalous and peculiar provision of the 6th sec. of art. 12, which was temporary in its effect, and has long since ceased to have effect. The doctrine there admitted is, that after the several classes of officers provided for in the constitution have been lawfully inducted into office, either by election or appointment, they do not hold at the pleasure of the executive, and can only be removed in the manner prescribed by law. The same doctrine is announced in *Marbury v. Madison*, 1 Cranch, 161-3. It is said: "Some point of time must be taken when the power of the executive over an officer, not removable at will, ceases. That point of time must be when the constitutional power of appointment has been exercised." After a long and earnest struggle in Great Britain, the independence of the judges of the crown was secured. It has always been supposed that that result has been achieved on this continent, by making their terms of office during good behavior, or for a definite term; by giving them a fixed compensation, and declaring that they shall only be removed for good cause, after trial and conviction, or on address of two-thirds of the legislature. In no other than one of these modes could Chancellor Simmons, if rightfully in office, be removed, so long as he could legally hold the office. The statute, sec. 106, requires the governor to report to the senate "all such appointments, requiring their approval, within ten days after the commencement of the meeting of that body, for their advice and consent to the appointment." The language implies that the appointment made in vacation



---

Opinion of the court.

---

shall be submitted to the senate. If the governor has the constitutional right to submit some other name to the senate than his appointee in vacation, we are clearly of opinion that he cannot remove such appointee and leave the office vacant, or to make room for another person, so long as the senate has not concurred with him in another appointment. The constitution has provided the modes, and only modes, of removing a judge.

If an office is filled by a person invested with its functions, the office is not vacant, and an appointment confers no right. *Commonwealth v. Hanley*, 9 Penn. St., 519. The law authorized the incumbent of an elective office to hold until his successor was duly elected and qualified. It was held, the governor could not fill as for a vacancy, because the office is temporarily filled by a person designated by law. *People v. Tilton*, 37 Cal., 624; *People v. Van Horn*, 18 Wend., 518.

A constitutional officer cannot be divested of an office, except in the manner provided for in the constitution. *State v. McNeely*, 24 La. Ann., 20; *State v. Towne*, 21 La. Ann., 490. Unless the governor may at pleasure remove an officer, his appointment when made is final. *Ewing v. Thompson*, 43 Penn. St., 372; *Weatherbee v. Caznean*, 20 Cal., 507. We conclude, therefore, that the governor had no authority to revoke the appointment made by the lieutenant governor or himself; and treating that revocation as treating a vacancy, fill the office by the appointment of another person.

But as we have seen, neither the governor nor, in his absence, the lieutenant governor, could rightfully make an appointment for the 10th district.

It will follow, therefore, that the acceptance of a commission, and the qualification of Mr. Simmons, did not invest him with the office *de jure*.

The subsequent removal of Mr. Simmons by the governor, was without warrant of law. If he had been legally appointed, the power of the executive to fill the office was exhausted.

---

Opinion of the court.

---

Manifestly, the constitution does not intend that the executive appointee to a chancellorship is tenant of the office at the governor's sufferance, and is removable at his pleasure.

The appointment of Mr. Campbell by Governor Ames, did not confer the office upon him legally and constitutionally.

But since Mr. Campbell, some time after his appointment, with the acquiescence of Mr. Simmons, entered upon the office, and discharged its functions; referring his claim so to do to the appointment and commission of the governor, he thereby became an officer *de facto*. He acted on a claim of right, and referred his possession and title to his appointment and commission..

That for the repose and quietude of society, constituted him *de facto* chancellor, and imparted virtue and validity to his judicial acts. In order that litigants and others who have an interest in his official doing, to prevent a failure of justice, to avoid confusion, it is the safe and prudent rule to treat him as a *de facto* officer. When the incumbent is in full, quiet fruition of the office, and has entered under color of right, the law clothes his acts with validity. "To constitute an officer *de facto*, there must be color of right by election or appointment, or an acquiescence by the public, for a length of time which would afford strong presumption of colorable right. Kimball et al. v. Alcorn et al., 45 Miss., 158.

Nor can a distinction be made between the acts of a *de facto* officer, assigning competence to some and incompetency to others. He is competent to do whatever the *de jure* officer may. Cooper v. Moore, 44 Miss., 392. It pertains to the chancellor to appoint a clerk in certain circumstances. When these circumstances exist, the *de facto* chancellor may exert the power with the same right that he may render a decree or punish for contempt.

What is the power of the chancellor to appoint a clerk? As we have seen, the mode prescribed in the constitution for filling vacancies in all county offices is by an election, which must be ordered by the board of supervisors. But since more or less time must elapse from the happening of a vacancy before the unex-

---

Opinion of the court.

---

pired term can be filled by election, the Code, § 983, makes provision for that emergency, as well as "for the refusal or inability of the incumbent to perform the duties," by enabling the chancellor to make an *ad interim* appointment until the office can be filled by election and qualification, or until the incumbent who has been temporarily disabled, and refused to act, resumes his duties. Such appointee shall perform the duties of clerk \* \* whilst he continues in office. The chancellor, for this limited time, is authorized — that the business pertaining to the office may not be impeded — to designate and assign some person to the performance of its duties. It would be a palpable evasion of the constitution if the board of supervisors should refrain from ordering an election, to the end that such appointee might enjoy the residue of the term in case of the incumbent's death, resignation or removal. The legislature could not provide for filling a vacancy which had thus happened, otherwise than by an election. The statute does not authorize the chancellor to fill the office for the balance of the term. Its scope and purpose is, until that can be done by an election, he may assign some person to discharge the duties of clerk. We think that Campbell, as *de facto* chancellor, had the right to designate the respondent to act as clerk.

The last question arises under the 16th section of the 4th article of the constitution. "No person liable for public moneys unaccounted for, shall be eligible \* \* to any office of profit or trust until he shall have accounted for and paid over all the sums for which he may have been liable." It is not controverted by counsel that this section may be applied to the appointment of a clerk of the chancery court by the chancellor. The allegation is, that the respondent Howe did receive large sums of money as treasurer of Panola county, for which he has not accounted and paid over, but is still liable therefor. But it is said that this default must have been ascertained and fixed by the judgment of a competent court before the disability accrues. The words do not impart an artificial or precisely fixed meaning, but are used in their

---

Opinion of the court.

---

ordinary and popular sense. The "liability for the public moneys until accounted for and paid over," is the disqualifying fact. It is not the *act* of misappropriation or embezzlement that *ipso facto* works the disability, but rather the *fact* that the person owes public moneys for which he is liable, not having accounted for them, and paid them over at the time he entered upon the office. It is not an absolute and perpetual bar arising from the act of default, but it is a disability that may be temporary, and is removed so soon as the funds are accounted for and paid over. It was designed to operate as a stimulus to honesty and an indemnity for fidelity in handling public money. If an officer has been entrusted with public funds, he shall not be eligible to any office of profit or trust *until* he has settled his accounts and paid over all sums for which he may have been liable. If he is a defaulter, that shuts the door of official employment against him *until* he has relieved himself from his defalcation.

The two succeeding sections, the 17th and 18th, also declare ineligibility; but in both instances, there must have been a conviction. The first, of "an infamous crime;" the other, "of giving or offering a bribe to secure an election or appointment." In these instances, the "conviction" of the infamous crime, or of offering or giving the bribe, is the fact that disqualifies. In the other, the nonaccounting for and nonpayment of the funds is the disqualifying circumstance.

In *Shelby v. Alcorn*, 36 Miss., 274, it was held, that sec. 26 of art. 3 of the constitution of 1832, which, for all the purposes of this application, is like sec. 38 of art. 4 of the present constitution, operated of its own force to make void the appointment of a member of the legislature to an office created during his term of service. The text is, "No senator or representative, during the term for which he was elected, shall be appointed to any office which shall have been created," \* \* \* etc. The interpretation which has been put upon words nearly identical in the case cited is, that the constitution operates a prohibition; and the

---

Opinion of the court.

---

appointment would not confer the office. Compare the language of that section with sec. 16 of art. 4, "No person liable for public moneys \* \* \* shall be elected," etc. And if it was a proper reading of the former section to hold the appointment of a senator or member of the house prohibited, the like rendering must be given to the latter. No senator, etc., shall be "appointed," etc. No person liable, etc., shall be "eligible." In both instances, the disqualification is, to take and hold. So the 8d sec. of art 12, operates of it own force, a disqualification. "No person who denies the existence of a Supreme Being shall hold any office in this state.

But it is insisted by counsel that the constitution means, that the matter, to wit: The liability for the public moneys must first be judicially determined before the disability attaches. What shall be the character of such proceeding? Shall it be a suit on the bond, as county treasurer, or other form of civil action? Suppose that a recovery had been had against Howe, in a civil suit, six months prior to November, 1872, and the day before he was appointed clerk he had paid the judgment, plainly he would have been eligible to the office of chancery clerk, for he had accounted for and paid over the funds for which he had been liable.

Shall the proceeding be by indictment. The 26th section of the 6th article makes clerks, sheriffs and other county officers subject to indictment \* \* for willful neglect of duty or misdemeanor in office, and upon conviction shall be removed from office. Suppose that Howe, whilst county treasurer, had been indicted, convicted and removed from *that* office, for a failure to account for and pay over the money, would the record of that conviction be evidence that he had not accounted for and paid over the money, when he was appointed clerk? If such evidence tended to prove his default, certainly the respondent could overcome it, if the truth were so by testimony, that after the conviction, and before the appointment, he had paid over the funds. These hypotheses serve to illustrate the true reading of the consti-

---

Opinion of the court.

---

tution, that the ineligibility is because the appointee, at the time he takes office, *detains* funds, for which he does not account and pay as required by law. The establishment of his "liability" by suit or indictment at some time prior thereto, does not *prove* that at the date of his appointment he was still derelict.

The infirmity in the argument of counsel is in construing the 16th section as of the same import as the 17th and 18th of the 4th article. These latter sections impose a *perpetual* ineligibility (not upon those who may have committed bribery, perjury \* \* or other infamous crime), but upon those who have been *convicted* of any of these crimes. There must be trial and conviction by a competent court.

Two inquiries are involved in settling the questions of ineligibility: First, is the respondent liable for the public money? Second, does that liability extend down (no matter when it originated) to the time of the appointment, or has it been discharged by a proper accounting and payment. For the ineligibility is removed the moment the delinquency ceases. These inquiries can be as fully and as thoroughly made in this proceeding, as in any form of civil action or as in the trial of an indictment. The defendant shall appear and answer such information in the usual way, and issue being joined, it shall be tried in the ordinary way. Code, § 1496. Such is the statute. The issue may be tried by a jury.

The case comes within the classification given in section 741, Ang. & Am. on Corp. Where the incumbent is assailed for various disqualifications, such as the want of proper age, residence, or whether the office is compatible with another subsequently accepted; or whatever other matter makes the incumbent ineligible, or forfeits the right to hold the office; in principle it is much like the case of *Commonwealth v. Allen*, 70 Penn., 471. The statute of Pennsylvania forbids a councilman from being the surety of the treasurer of the town. Allen was proceeded against by *quo warranto*, to oust him from his office of councilman, because he had become the surety of the treasurer. The statute also made the

---

Syllabus.

---

act a misdemeanor, and on conviction the party could be fined not exceeding \$500. The objection was urged (as in this case), that there must be in an independent suit, a judicial ascertainment of the illegal act, as by conviction of the misdemeanor. But the court held that the act of becoming security for the treasurer was forbidden, and worked a forfeiture of the office. Say the court, "Forfeiture arises in the unlawful relation, not upon conviction for the misdemeanor. The consequence of the conviction is the fine, but this does not enforce the forfeiture. The *quo warranto* is to enquire, not into the misdemeanor, but into the rights of the member to continue in office."

For the misdemeanor in the office of treasurer, the respondent might have been indicted, and punished as provided in section 2890 of the Code.

This proceeding is not designed or adopted to inquire into, much less punish the misdemeanor, but to determine the right of the respondent to the office, by reason of the alleged ineligibility thereto.

We are of opinion, therefore, that the demurrer to the second specification of the information ought to have been overruled; rendering such judgment as the circuit court ought to have rendered. The demurrer is overruled, and cause remanded for further proceedings.

---

W. W. COCK et al. v. M. E. OAKLEY et al.

1. FRAUD—VOLUNTARY CONVEYANCE. — O. being indebted to C., made a voluntary conveyance of land to her son, after which C. brought suit and recovered judgment against O.; the conveyance is shown to be in all things free from fraud in fact, and made in accordance with a previously expressed purpose to make a provision for her son. A bill will be entertained, nevertheless, to vacate the conveyance. The law presumes that a voluntary conveyance, resting upon moral motives, is void as against existing creditors. The donee may show circumstances which repel the

---

Briefs.

---

presumption, as that the donor was in a prosperous condition, and retained ample means accessible to discharge all obligations. The gift must be reasonable, apparently in no serious degree putting in hazard the right of existing creditors.

APPEAL from the Chancery Court of Benton County. Hon. L. C. ABBOTT, Chancellor.

The material facts in this case are stated in the opinion of the court.

*Kimbrough & Abernathy*, for appellants :

The evidence sustains the bill. The debt existed, the judgment had been obtained on it. The conveyance was without consideration. The debtor divested herself of all visible property. The execution had been regularly issued and returned *nulla bona*. A voluntary conveyance is not good as to creditors, whatever be the actual intent. *Young v. White*, 3 Cush., 146 ; *Swayze v. McCrossin*, 18 S. & M., 317 ; *Catchings v. Manlove*, 10 George, 655 ; *Bogard v. Gardley*, 4 S. & M., 302.

*T. J. & F. A. R. Wharton*, for appellees :

It will be observed that the deed bears date *December 31, 1872*, while the original suit in the justice's court was brought by the appellant, *January 30, 1873*. Judgment was rendered for defendant in that court, and an appeal was taken to the circuit court, and judgment was rendered against Mrs. Oakley on *August 24, 1874*. The execution was returned "no property found," and the bill was filed on *October 15, 1874*. It was not shown that the judgment was enrolled, and we insist that no lien existed against the land ; the fraud charged in the bill is fully denied in the answer. The proof shows that the goods charged to Mrs. Oakley were sold to her son, on his own account, and that she was not liable for the price of them. The amount of the account (\$54.00) was too trifling to have been any inducement to make a fraudulent conveyance of land worth several times as much, and knowing that she had not purchased the goods, she could not and did not, from the very nature of things, have thought of the claimant or his claims.



---

Opinion of the court.

---

SIMRALL, J., delivered the opinion of the court.

The complainant, W. W. Cock, had recovered judgment in the circuit court of Benton county, against the defendant, Mrs. Oakley, upon which execution had been issued and returned *nulla bona*. After incurring the liability, upon which the judgment was founded, Mrs. Oakley made a voluntary conveyance of a quarter section of land to her son.

The object of the bill is to vacate this conveyance, and declare the land subject to the satisfaction of the judgment.

The proofs in the cause make it clear, that Mrs. Oakley did not make the conveyance with the motive and intent to defeat the complainant's demand. She did not suppose she was liable for the debt asserted against her, and controverted that point with the complainant in good faith. The transaction between Mrs. Oakley and her son is free of all fraud in fact, and was consummated in accordance with a previously expressed purpose to make a provision for her son.

The chancellor dismissed the bill, because, as recited in the decree, there was no evidence of an actual fraud intended by Mrs. Oakley. We entirely concur with the chancellor that such is a just and proper conclusion. But this case does not need the establishment of that fact in order that the complainant may succeed. The judgment at law is conclusive against Mrs. Oakley of indebtedness. It does not avail to attempt, by evidence, to show that there ought to have been no recovery against her. It might be conceded that the testimony greatly preponderates to establish the fact that the son took up the goods as a mode of getting payment of his salary, due him from the complainant, and that they were not bought by Mrs. Oakley, or upon her credit. But those matters were involved in the suit at law, and were settled by the verdict and judgment. If the relief of the complainant depended on the question whether there was an *actual* fraud or not; that is, whether the conveyance was prompted to be made by the motive of evading this debt, such testimony would be pertinent and valuable.

---

Syllabus.

---

But the law assumes, or presumes, that a voluntary conveyance resting upon moral motives is void as against existing creditors. The donee, however, may show the circumstances which repel and overcome that presumption. As that the donor was in prosperous condition, and retained ample means, accessible to creditors, to discharge his obligations. The gift must be reasonable, apparently in no serious degree putting in hazard the rights of existing creditors. *Wilson v. Kolheim*, 46 Miss., 346; *Pennington v. Seal*, 49 ib., 524; *Catchings v. Manlove*, 39 ib., 669.

The inquiry, then, should have been, was the advancement which Mrs. Oakley made to her son, reasonable? Did she retain ample means to discharge her debts? Could serious prejudice incur to her creditors because of the conveyance?

The testimony establishes that the sheriff could find no property upon which to levy an execution. One witness stated that Mrs. Oakley had five or six thousand dollars in money. But it is easy to keep that beyond the reach of creditors, as has been successfully done by Mrs. Oakley.

Upon the facts developed in this case, we are of opinion that the voluntary conveyance by the debtor to her son, does not protect the land against the complainant's judgment.

Whereupon the decree of the chancellor dismissing the bill is reversed, and decree in this court declaring the right of the complainant to have satisfaction of the judgment out of the land.

---

A. POLLARD v. O. Q. ECKFORD.

1. LIMITATION OF ACTIONS — REVIVOR OF JUDGMENT AGAINST AN ADMINISTRATOR, DE BONIS NON. — P. recovered judgment against A., November 18, 1860. A. died November 4, 1865. K. was appointed administrator of the estate of A., June 6, 1866. K. died, and E. was appointed administrator *de bonis non*, November 2, 1871, *scire facias* to revive the judgment in favor of P., April 12, 1873; *held*, that the action was barred by the statute of limitations. When the statute of limitations is once put in motion,

---

Brief for plaintiff.

---

It is not arrested by any subsequent disability; this is the rule, but if the disability is of a temporary character, growing out of a positive statutory provision, the time of such temporary disability should be excluded. In a *scire facias* to revive a judgment, the object is to make a new party to the judgment, and charge him with the duty of making satisfaction, and he cannot set up any defense which existed anterior to the original judgment, and which might have been pleaded in bar of the original action.

ERROR to the Circuit Court of Monroe County. Hon. B. B. BOONE, Judge.

The material facts in this case appear in the opinion of the court.

It is assigned for error:

1. The court below erred in refusing the 1st, 2d, 3d, 4th, 5th and 6th charges asked by plaintiff.
2. In overruling plaintiff's motion for a new trial.
3. In rendering judgment for defendant (also defendant in error) under the state of pleadings.

*Murphy & Sykes* for plaintiff in error:

Judgment was recovered against the decedent in his life time, and this is an action to revive the judgment against the administrator. Defendant pleaded the statute of limitations of seven years under Rev. Code 1871, § 2153, which is a copy of the Code of 1857. This suit is in the nature of an *original action*, and could not be brought in Code of 1871, § 1184, suspending the statute for six months in which to bring suits against an administrator or executor. Sections 1181, 1182, Code of 1871, provide that where suits are pending against a decedent at his death, against an administrator at his death or removal, or judgment against a former *administrator* may be revived immediately upon the appointment of an administrator, or an administrator *de bonis non*, but does not provide for the revivor of judgments. This is an original action. 4 Haskell, Tenn. Rep., 31; Breckenridge v. Mellon, 1 How. Miss., 274. In the case of Sims v. Nash., 1 How., Miss., 272, which was a proceeding upon a judgment obtained in

---

Brief for defendant.

---

the life time of the decedent, the court say: "the defendant could have plead to the *scire facias*, as to any other action; it was an original action." We insist that this is such a suit or action as was intended to be prohibited for nine months after the appointment of the administrator. Code of 1857, p. 456, art. 126. See *Jennings v. Love*, 24 Miss., 255; *Dowell v. Weber*, 2 S. & M., 455-6; Code 1857, p. 401, art. 18. The case of *Vick v. Chewning's heirs*, 31 Miss., 201, upon which defendants rely, was based upon *Hutchinson's Code* p. 830 and 831, sec. 8, which though nearly in the language of the Code of 1857 and 1871, has no such exceptions as is contained in the latter statutes.

*Houston & Reynold*, for defendant in error:

It will be seen from the record the *seven years, two months and twenty-six days* elapsed from the date of appellant's judgment to the commencement of proceedings to revive, exclusive of the time the statute was suspended.

"Judgments in any court of record in this state, shall not be revived by *scire facias* \* \* \* after the expiration of seven years next after the date of said judgment." *Hutch. Code*, p. 830, § 8. This statute is construed in the case of *Vick v. Chewning's heirs*, 31 Miss., 209, and we insist that the action is barred by limitation. *Bouvier's Law Dictionary*; *Freeman on Judgments*, p. 367, § 444; *Denegre v. Haun*, 13 Iowa, 240; *Fitzhugh v. Blake*, 2 Cranch. C. C., 37; *Hopkins v. Howard*, 12 Texas, 7, cited *Code of 1857*, p. 400, art. 11; *Code of 1871*, p. 471, § 2155. If the word *scire facias* was intended by the legislature to be embraced in the words suit or action, why place in the statute books invariably suit, action or *scire facias*? The case in 27 Miss., 488, to which counsel refer, has no relevancy to the case at issue. The cases referred to in 2 S. & M., and 24 Miss., are founded on actions of assumpsit, foreign to the law enacted for the revival of judgments by *scire facias*.

As to the deduction of time, see *Byrd v. Byrd*, 6 Cushman, 144. If we are correct in our view of the law, the appellant's judgment

---

Opinion of the court.

---

is barred, and the court below did not err in refusing the charges asked by counsel.

SIMRALL, J., delivered the opinion of the court.

The agreed case is this, viz: Austin Pollard recovered judgment the 13th of November, 1860, against B. Allen. Allen died the 4th of November, 1865. Kendrick was appointed administrator, June 6, 1866, and resigned October 8, 1869. Eckford was appointed administrator *de bonis non*, November 2, 1871. The *scire facias* was issued April 12, 1873, to revive the judgment against Eckford.

It was ruled in the circuit court that the *scire facias* was barred, and the judgment was for the defendant. The correctness of that ruling and judgment is the only question in this court.

The statute commenced running against Allen in his lifetime. The rule is that when the statute of limitations is once put in motion, it runs on, and is not arrested by any subsequent disability. *Jennings v. Love's Adm'r*, 24 Miss., 255. But if the disability is of a temporary character, growing out of a positive statutory provision, the time of such temporary disability should be excluded. *Dowell v. Weber's Adm'r*, 2 S. & M., 452. In that case it was held that the nine months after the publication of the grant of letters of administration, before suit can be brought against the administrator, was an enlargement *pro tanto*, of the time allowed to sue upon a promissory note, the effect being to give the plaintiff six years and nine months. The general statute is suspended for the prohibited period, so that the prohibited time constitutes no part of the six years. The same point was ruled in *Moses v. Jones' Adm'r*, 2 Nott & McCord, 259.

The 8th section of the act of 1844 provided that judgments in any court of record of this state shall not be revived by *scire facias*, \* \* \* after the expiration of seven years next after the date of such judgment. In *Byrd v. Byrd*, 28 Miss., 150, this section was considered under these circumstances.

---

Opinion of the court.

---

At the October term, 1837, of the probate court, a decree was rendered in favor of Wells, administrator of Lee Byrd, deceased, for \$818.65, on account of the distributive share of the intestate, of the estate of Asha Byrd, deceased. Wells died 1st of April, 1844. An administrator, *de bonis non*, was appointed, in 1853, on the estate of Lee Byrd. It was insisted in favor of the review of this decree, that the time during which the estate was vacant for want of a personal representative, *i. e.*, from April, 1844, until 1853, should not be computed as part of the seven years allowed the plaintiff, in this mode to assert his right. But it was held, that inasmuch as the statute had commenced running against Wells, the first administrator, it was not interrupted by his death, and suspended until his successor was appointed. Vacancy in the administration would not stop the running of the statute.

In *Vick v. Chewning's heirs*, 31 Miss. Rep., 208, the judgment against Chewning was recovered January 30, 1842, who died shortly prior to October 22, 1852. On that day a writ of *scire facias* was issued against his administrator. It was held that the remedy must be pursued within seven years from the date of the judgment, although execution has been regularly issued from year to year.

Seven years, two months and about 16 days have elapsed in this case since the recovery of the judgment, and before the *scire facias* was sued out, deducting the time of the suspension of the statute during the war, and until April 2, 1867. To avoid the law, it is contended by counsel for the plaintiff in error, that art. 126, p. 456 of the Code of 1857, or § 1184 of the present Code, applies. The language in both cases is precisely the same, except "six months" in the latter is used instead of "nine months" in the former. "No suit or action shall be brought against any executor or administrator, in such capacity, until after the expiration of nine months (six months) from the date of letters testamentary or of administration." If either the longer or shorter period be deducted from the seven years, the writ is not barred.

---

Opinion of the court.

---

Is a *scire facias* to rise a judgment, a suit or action within the meaning of this statute? The circumstances under which service must take place are laid down in *Penoyer v. Brace*, 1 L. Raymond, 245, viz: where a new party is to be benefited or charged by the execution of a judgment. See also *Davis v. Helm*, 8 S. & M., 34. Where the process goes against an administrator, the judgment is that the plaintiff have execution, to be levied, etc., for the judgment mentioned in the *scire facias*, and costs. *Vredenburg v. Snyder*, 6 Iowa, 39. *Woolston v. Gale and Bodine*, 4 Halst., N. J., 32.

The formal averment in the writ is, "that although judgment aforesaid is given, execution for the debt \* \* remains to be made to the plaintiff." The single object of the writ is, to make a new party to the judgment, and charge him with the duty of making satisfaction; therefore it only runs against a party liable to make satisfaction. No defense, which existed anterior to the judgment, and which might have been pleaded in bar of the original action, can be set up against the *scire facias*. *Bowen v. Bonner*, 45 Miss., 10.

It is a judicial writ issuing out of the court where the record is. But because the defendant may plead thereto, it is called an action. 2 Tidd Prac., 1090. For some purposes at common law, it was in nature of an original action, as to repeal letters patent. *Ib.* But where the purpose is to revive a judgment against an executor or administrator, so as to charge the personal representative with the duty of payment, and have the right to execution against the decedent's effects, it is but the continuation of the former suit, and not an original proceeding. *Hopkins v. Howard*, 12 Texas, 8; *McGill v. Perrigo*, 9 John. Rep., 259; *Eldred v. Hazlett*, Adm'r, 38 Penn. St., 32; 12 S. & R., 412. A new judgment cannot be rendered. The proper entry is that the plaintiff have satisfaction of the judgment already secured against the intestate, etc.

It depends upon the character of the judgment, appropriate to the allegations of the writ, whether it is the commencement of an

---

Opinion of the court.

---

original action, or a judicial process, in *quasi* continuation of the former suit. If it be to revive a former judgment, it is in the nature of a writ of execution. Tidd's Prac., 8th ed., 1140; Philips v. Brown, 6 T. R., 284; Co. Litt., 291, a; Foster on Sci. Fa., p. 11. In one sense for all purposes it is in nature of an action, because the defendant may plead to it. It is strictly the beginning of a new or original action, when it is issued to repeal letters patent. Bacon Abridg. Sci. Fa., c. It is also an original proceeding when founded upon a recognizance. 2 Wm. Saund., 71, b; Foster Sci. Fa., 13. It is original because there has been no former suit against the conversor.

In Vick v. Chewning's heirs, 31 Miss., *supra*, no intimation is given by the court, that the provision in the act of 1844, prohibiting a suit or action against an administrator for nine months, is applicable to the proceeding to revive a judgment against him. No reference is made to the point. The language of the court is broad and general that the remedy is barred, unless pursued within the seven years; although the question involved in our case, was not discussed by the court. We think that sec. 1184 of Code of 1871, and its original in Code of 1857, art. 126, p. 456, prohibiting suits or actions for 6 months in the former and 9 months in the latter, against administrators, was intended to embrace only original suits, and does not include such judicial processes, as are but continuations of a suit, brought against an intestate in his lifetime. In Breckinridge's Adm'r v. Mellon, Adm'r, 1 How., 273, the *scire facias* was to make the administrator a party before judgment; it was held, that the prohibitory statute did not apply because it was not predicated on any thing that would give it the character of a new action.

As we have seen, the authorities characterize the process, after judgment, as a judicial writ, in continuation of the original suit, a necessary means to procure satisfaction of the judgment.

More than the seven years have expired since the judgment was obtained; the right to a revivor has therefore expired. It is



---

 Syllabus.
 

---

unnecessary to consider the several propositions of law propounded in the prayers for instructions granted and refused.

The result in the circuit court is in accordance with these views.

Judgment is therefore affirmed.

---

60 638  
87 437

## STATE BOARD OF EDUCATION v. CITY OF WEST POINT.

1. **MANDAMUS — WHEN THE ACTION WILL LIE.** — Where a discretion is left to an inferior tribunal, the writ of *mandamus* can only compel it to act, but cannot control the discretion. The writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. Being regarded as one of the highest writs known to our jurisprudence, it can only be invoked when there is a clear specific legal right, and a duty which can be performed, and there is no other specific and adequate legal remedy.
2. **SAME — SAME — CASE IN JUDGMENT.** — The city of West Point collected large sums of money from the sale of licenses to retail vinous and spirituous liquors, and used the same for the ordinary purposes of the city government: *Held*, that this money should have been paid into the state treasury as a permanent school fund. Const., art. 8, sec. 6. If the amount of indebtedness by the city authorities be uncertain and unliquidated, the writ of *mandamus* will not lie to compel the levy of a tax to pay the debt. The creditor should first obtain his judgment, and then if there is no money in the treasury out of which his judgment can be paid, he may ask for a *mandamus* to compel the board to levy a tax to pay off his judgment, unless there be some special statute providing another remedy.

ERROR to the Circuit Court of Colfax County. Hon. J. A. ORR, Judge.

The facts in this case are fully set out in the opinion of the court.

*G. E. Harris*, Attorney General, for plaintiff in error:

The mayor and selectmen of the city of West Point collected

## Brief for plaintiff.

large sums of money from licenses to retail vinous and spirituous liquors, and used the same for ordinary city purposes. They should have paid this money over to the state treasurer as a permanent school fund. Const., art. 8, sec. 6.

The petition shows that the defendants had no property liable to execution, had a judgment been obtained. Where a specific duty is required to be performed, and it involves no question of discretion, *mandamus* is the proper remedy. High on Ex. L. Rem., p. 26.

The sum of \$4,500 being admitted, and no money to pay that sum, *mandamus* is the proper remedy to compel the levy and collection of the tax to pay the debt. 2 Vernon (N. J.) Rep., 446; High on Mandamus, 264.

It will not be denied that the city of West Point is bound for the moneys so misapplied. Glidden v. Unity, 33 N. H., 571; Crawshaw v. City of Roxbury, 7 Gray, 374; Rev. Code 1871, § 1996-7, p. 455.

*Beverly Matthews & H. B. Whitfield*, on the same side:

The possession of the money and the ownership by plaintiff is not denied by the defendants. It is submitted, that the charter amendment violates the 6th sec. of art. 8 of the constitution, and is an attempt to repeal § 2457 of the Code of 1871. The funds should have been paid into the state treasury for school purposes. Code of 1871, § 2457. The law commits the general management of this fund to the state board of education. *Ib.*, § 1996-7. We insist that *mandamus* is the remedy. 27 U. S. Digest, p. 431, § 30; *Moses on Mandamus*, p. 15; *Nelson v. Justices of Carter Co.*, 1 Cald., Tenn., 207. *Mandamus* is, in modern practice a suit at law. *Dillon*, 620; *Judd v. Driver*, 1 Kansas, 455; 24 U. S. Dig., 432, § 29; *Kentucky v. Dennison*, 24 How., U. S., 66; 21 U. S. Dig., 371, § 1; *Dillon*, 622. The city own no property, and if they did, it would not be liable to execution at law. *Chicago v. Hasley*, 25 Ill., 595; *Horner v. Coffey*, 25 Miss., 434. If the remedy be doubtful, *mandamus* will lie. *Clark v.*

## Brief for defendant.

Miller, 47 Barb., 38; 27 U. S. Dig., p. 430, § 15; Crandall v. Amador, 20 Cal., 72; U. S. Dig., 391, § 14; People v. Romero, 18, ib., 89; 22 U. S. Dig., p. 395, § 19; 31 Maine, 272; 23 Vt., 487; 12 U. S. Dig., 429, §§ 3 and 8; 5 Texas, 471; 13 U. S. Dig., 476, § 23; Moses on Mandamus, p. 87; ib., 92; Griffin v. Steele, 1 Edm., N. Y. Select Cases, 505; 28 U. S. Dig., p. 410, § 10; State v. Hammell, 2 Vroom (N. J.), 446; 27 U. S. Dig., 430, § 17; Dillon, 621; 9 S. & M., 77; 40 Miss., 268; Dillon, 627; 28 Miss., 38; 42 Miss., 238.

*Barry & Bream*, for defendants in error:

The main questions raised by the demurrer are, that the matters sought to be enforced, are undefined and uncertain, that there is a plain and complete remedy by the ordinary process at law. It will not be granted unless the applicant show at least a *prima facie* case, and there must be no other specific remedy. Board Police v. Grant, 9 S. & M., 77; Swann v. Buck, 40 Miss., 268; Ross v. Lane, 3 S. & M., 695; Beaman v. Board Police, 42 Miss., 237; Angel & Ames on Corporations, §§ 698, 710. Moses on Mandamus, 205; 1 Ohio, 77. If the writ claims too much it will be dismissed. Moses on Mandamus, 207. The relators have another plain and adequate remedy, and mandamus will not lie. 9 S. & M., 90; 42 Miss., 250; 40 Miss., 268; 2 Dillon on Mun. Corp., § 686; Angel & Ames on Corporations, § 714; The King v. Bank of England, 2 Doug., 526; Angel & Ames on Corporations, § 710; Boyce v. Russell, 2 Low (N. Y.), 444; Asylum v. Phoenix Bank, 4 Con., 172. It has been held that a creditor may sue and recover judgment against a corporation, which may be enforced by execution, that mandamus will not lie to compel payment in advance of judgment obtained, and this view is the one most consistent with principle, etc., that mandamus will lie to compel the levy of a tax to pay such judgment. People v. Clarke Co., 50 Ill., 213, 1869; State v. County Judge, 5 Iowa, 380; Coy v. Lyons, 17 Iowa, 1; State v. Davenport, 12 Iowa, 385; Lexington v. Mulliken, 7 Gray, 280, 1856; State v. Clay Co., 46 Mo., 231,

---

Opinion of the court.

---

1870. There must be a *clear legal right* in the relator before mandamus will lie. 1 Dillon on Mun. Corp., § 665; Commonwealth v. Pittsburg, 34 Pa. St., 496 and 495; Indianapolis R. R. Co. v. State, 37 Ind., 489; Rex v. Nott Water Work, 6 A. & E., 355.

SIMRALL, J., delivered the opinion of the court:

This is an action of mandamus, brought on the relation of the state board of education, against the mayor, selectmen and treasurer of the town of West Point, having for its general object a payment into the state treasury for the use of common schools, by these corporate authorities, of the money collected for licenses to retail vinous and spirituous liquors within the town.

The state board of education state in their petition substantially, that sec. 6 of art. 8 of the constitution provides for the establishment of a common school fund, consisting, in part, of all moneys received for licenses for the sale of intoxicating liquors.

That the statute, Code of 1871, sec. 2457, authorizes the corporate authorities in towns and cities to grant licenses, and to assess and collect the tax therefor. The sums so received to be paid into the state treasury for use of common schools.

That the municipal authorities of West Point have, since the adoption of the constitution, granted licenses to sundry persons, for which they have received \$4,500. Other licenses have been granted and moneys paid therefor, but petitioners cannot give an accurate statement thereof. And that the corporate authorities have declined and refused to give a full and complete information on request made; but have refused to allow petitioners to inspect their records and papers or to furnish transcripts when demanded.

That said corporate authorities have used and applied the moneys thus received to defray its ordinary, corporate expenses. The town treasurer has refused and failed to pay these funds into the state treasury, after demand made so to do.

There being no money in the treasury, the corporate authorities have declined to make provision to pay these moneys by taxation, as requested.

---

Opinion of the court.

---

The prayer is for a writ of mandamus, commanding the mayor and selectmen to make an exhibit of their books, papers, records, vouchers, to audit the claim, to ascertain the sum collected on account of licenses since the adoption of the constitution, what has been paid into the state treasury ; and lastly, commanding them to assess and collect a tax upon the property of said town, sufficient to pay the full sum so found due, etc.

The alternate writ which was issued contained a recital of the matters set forth in the petition, and warned the defendants to perform the acts required, or to appear and show cause.

To this alternate writ there was a demurrer setting forth sundry special grounds, but all of them are, perhaps, particulars resolvable into the general proposition, that the relators have not stated a case appropriate to the relief in this form of action.

The statute preserves the essential characteristics of the proceeding as at common law. The petition of the relator stands in the place of the suggestion and affidavit, which at the common law are the basis of the suit. The alternative writ must allege the facts upon which the relator relies for relief, and must with certainty and particularity state the precise thing the respondent is required to do. It is of the nature of pleading and process both. It serves to advise the respondent of the nature and grounds of the relator's right, and of the thing to be done or omitted by the defendant; it is like process, inasmuch as it is the original of the peremptory writ. Indeed the latter is putting the former in positive and peremptory terms, and must strictly conform to it. In the alternative writ the mandatory clause should state the precise thing required of the respondent. High on Extra Rem., § 539; *People v. Brooks*, 57 Ill., 142.

If this writ is defective in any important particular, it may be quashed or defeated on demurrer. 1 Dill. Mun. Cor., § 706.

The code of 1871 defines and describes the writ very much as it was at common law, viz: "A writ issuing out of the circuit court commanding an inferior tribunal, corporation, board, officer

---

Opinion of the court.

---

or person to do or not to do an act, the performance or omission of which the law specially enjoins as a duty resulting from an office, trust or station. Sec. 1517. The regulations in §§ 1521-1522 or declaratory of or re-enactments of the common law "where a discretion is left to an inferior tribunal, it can only compel it to act," but cannot control the discretion. The writ shall not be issued in any case where there "is a plain, speedy and adequate remedy in the ordinary course of law." See to same point, High's Extraordinary Remedies, pp. 8 and 9.

Being regarded as one of the highest writs known to our jurisprudence, it can only be invoked where there is a clear, specific, legal right and a duty which can be performed, and there is no other specific and adequate legal remedy. *People v. Mayor of Chicago*, 51 Ill., 28; *State v. Sup'rs Washington Co.*, 2 Chand., 250. The test of the right to this mode of relief is, first, has the party a clear, certain, legal right; and second, has he any other adequate remedy? If the law affords any other adequate remedy, this extraordinary redress will be denied. *People v. Brooklyn*, 1 Wend., 318.

The right which the relators assert is, that the respondents have collected and applied the money received for the licenses, to the purposes and uses of the town. It is admitted that the town authorities could rightfully issue the licenses, and fix the amount to be paid in each case. Code, § 2457. But the sum so received "to be for the use of the common school fund, and paid into the state treasury for that purpose." The treasurer of the corporation must collect the amount appointed to be paid therefor, before the license shall be issued. See § 2460. It is the duty of the town treasurer to pay the money thus received by him into the state treasury. Although the corporate authorities determine the amounts to be paid for the licenses, and direct their issuance, and the money is collected by its officer, yet the funds are in no proper sense corporate funds, but belong to the state, to be exclusively devoted to the object named in the constitution and stat-

---

Opinion of the court.

---

ute. To grant the licenses and collect the taxes therefor, the corporate authorities are made the officers or agents of the state. The treasurer of the town is constituted collector for the state. If he should embezzle the funds, it would be difficult to say that the town should be responsible for his misconduct. But if the moneys go into the town treasury, and are actually used by the corporate authorities, with their sanction or acquiescence, for corporate purposes, then the town would be clearly liable as for money had and received.

The gravamen of the complaint made by the relators is, that the town of West Point has received and directed to its own use, this fund, the exact amount of which is unknown to them, and the treasury being empty, there is no present means of payment, therefore a necessity arises to impose a special tax.

Upon the allegations in the petition and the alternate writ, the respondents are the creditors of the state on account of the school fund, and liable to account with those charged with the supervision and control of the fund. That duty as well as the power to bring and maintain appropriate suits at law and in equity in respect of the common school funds, is confided to the state board of education. Code, §§ 1996, 1997.

The respondents are creditors of the common school fund because, as averred, the fund has been collected and applied to ordinary corporate purposes, instead of being paid into the state treasury as required by law. The respondents are chargeable with a diversion and conversion of the money. But are the relators clothed with that dignity and conclusive right as creditors, which entitles them to the assistance of this extraordinary remedy?

In the first place, the amount of the indebtedness is uncertain and unascertained, and can only be discovered by a production of the corporate books, papers and records, which are asked to be produced to that end. Two several branches are distinctly presented in this suit. First. That there shall be an accounting

---

Opinion of the court.

---

based upon the municipal records and papers and other evidence, in order to determine the amount received by the respondents, and when that has been judicially determined, then an award of further judgment that the municipal authorities assess and collect a proper tax for its payment.

There is uncertainty as to the amount of the debt, and uncertainty also as to the amount required to be raised by taxation. "*Mandamus* is the appropriate remedy, when the party has no other remedy, and where the right or duty is certain. It will not lie if it is not." Board Police, etc., v. Grant, 9 S. & M., 90. That case is similar to this in its features, and the relief sought. Grant claimed that the county was indebted to him \$12,155, and his prayer was for a warrant on the county treasury for that sum, and if there was no money in the treasury, then, that the board of police should be required to levy a special tax for its payment. The answer to the alternate writ denied indebtedness. It was held that power resided in the circuit court to compel the board of police to audit the claim; but not to control or direct its decision; and second, if the claim had been allowed, and a warrant ordered to be issued, then *mandamus* would lie against the clerk of the board to issue the warrant, and if there were no money in the treasury, the board could be compelled to assess a tax. The doctrine of this case, and others of the same class, rests upon the predicate that the board is by statute required to audit all claims against the county, and, if allowed, it is so noted upon the minutes, and thereupon "the clerk shall issue a warrant on the county treasurer, under the seal of his office, in favor of the claimant for the amount allowed." If the board does not provide means to pay creditors, who have certain liquidated and allowed demands against the county, then a case has arisen for redress by the extraordinary writ of *mandamus*. If the board refuses to allow a claim, then suit may be brought in the circuit court, and if the creditor recover, the "board shall allow the same, and a warrant shall issue as in other cases." Code, § 1384. When the adjudica-



---

Opinion of the court.

---

tions speak of the right of a creditor being "certain," "positive," (9 S. & M., *supra*; *Beamman v. Board Police*, 42 Miss., 242), against a county, so as to give him remedy by *mandamus*, they mean a legal debt which has been allowed by the board, or recovered upon in the circuit court, and not a mere claimant and creditor at large. *Arthur v. Adam & Speed*, 49 Miss., 408.

But the relators allege in effect, that the municipal authorities repudiate their demands in every particular; decline to pay the \$4,500 stated to have been received from certain persons named, and to produce their records in order that the other collections may be discovered, their claim is unliquidated and uncertain as to amount. In order to clothe themselves with the right to the writ of *mandamus*, the relators must present a certain, ascertained liquidated demand; they should at least settle the amount of the indebtedness by the recovery of a judgment at law against the respondents. *People v. Clark County*, 50 Ill., 213; *State v. County Judge*, 5 Iowa, 380.

In *People v. Clark County*, *supra*, the relator was a creditor of the county, and holder of a warrant issued by the proper officer, on the county treasurer. The alternate writ was to show cause why a tax should not be levied to pay his warrant. It was quashed, upon the ground that no other than a judgment creditor could have that remedy. It is because of the peculiar character of the functions of our board of supervisors having, as it is said, judicial as well as ministerial functions—in some respects a court and in others a *quasi* corporation—that greater conclusiveness is given to many of their acts than is assigned to the corresponding body in many other states. See *Carroll v. Board Police*, 28 Miss., 38; *Madison County Court v. Alexander, Walker*, 523; 42 Miss., 242; 9 S. & M., *supra*.

The general principle, well fortified by authority, is that the creditor of a city or town has no right to the extraordinary writ of *mandamus* to compel the municipal authorities to levy and collect a tax to pay his debt, until he has reduced his demand to judg-

---

Opinion of the court.

---

ment. The ordinary remedies are open to such creditors, and they must resort to them, unless the debt was contracted under a special statute, which provided some specific remedy in addition to, or in substitution of the ordinary suit. When the judgment has been obtained, and there is no property subject to execution, then the city or town may be forced by *mandamus* to impose the necessary tax. *Coy v. City Council of Lyons*, 17 Iowa, 7; *Inhabitants of Lexington v. Mulliken*, 7 Gray, 281; *Horner v. Coffey*, 25 Misa, 434; *Walkley v. Muscatine*, 6 Wallace, 481.

But there is a class of exceptional cases, arising under peculiar statutes, where a recovery of judgment in the first instance has been dispensed with; as where a municipal corporation is authorized to incur a specific debt and to make provision for payment of principal and interest, by the assessment and collection of taxes. In such cases, the writ may be awarded without judgment, if the debtor does not allege or claim a valid defense. But if there is any doubt as to the validity of the debt, or the debtor prefers a defense, the writ of *mandamus* ought to be withheld until the demand has been established by judgment. 1 *Dillon's Muni. Corp.*, §§ 687, 688, and cases in notes.

The relator's claim against the town of West Point is not manifested by bond, note or other writing. There does not exist the privity and relation between the parties of creditor and debtor by express contract. The liability of the town grows out of a tortious conversion, to its own use, of part of the common school fund. Certainly, it cannot be affirmed of a claim of that sort, that it has such certain and positive and conclusive character as to constitute the foundation of the right to the writ.

Before the stringent remedy of compulsory taxation can be resorted to, the right must be established by judgment at law; and then, if there be no property accessible to final process, the relators will have demonstrated the necessity as well as the right to a *mandamus*.

The judgment, sustaining the demurrer and dismissing the suit, is affirmed.

---

Brief for plaintiff.

---

## P. BUCK, Ag't, v. PAINE &amp; RAINES.

1. **MORTGAGE — BY LESSEE FOR SUPPLIES — LIEN FOR LABOR.** — The act of April 5, 1872, gives a "first lien in law" upon all agricultural products to secure payment of the wages of the laborer, whether to be paid in money or in products. It operates against the landlords and all other persons interested in such products. It takes effect as a limitation or restriction upon the power of the employer, by contract, mortgage or other act, to defeat this first lien created by law, to secure to the laborer his wages, out of the fruits of his industry, and the employer can create no other lien that will be paramount to it. A mortgage executed after the passage of this act is subordinate to the right of the mortgagor to employ laborers, and thereby by operation of law create the lien in their behalf, although such employment might be subsequent to the date of the mortgage. The act of February 18, 1867, was in force, until repealed in October, 1873.
2. **SAME — SAME — PURCHASE FOR VALUE WITHOUT NOTICE.** — Whatever will put a party upon inquiry, which if pressed with ordinary diligence and understanding, would lead to knowledge of the requisite fact, is notice of it. A subsequent purchaser or creditor about to deal with the property, if they have notice of a prior claim or equity, or of facts, which if followed up, will discover the truth, are put under a duty to make the investigation, and if they fail to do so, are charged with knowledge which the inquiry would have disclosed.

ERROR to the Circuit Court of De Soto County. Hon. E. S. FISHER, Judge.

The facts of this case fully appear in the opinion of the court. It is assigned for error:

1. In giving the instructions asked for by plaintiff.
2. In refusing the instructions asked for by defendant.
3. In refusing motion for a new trial.

*Harris & George*, for plaintiff in error:

1. We do not claim that the legislature has the power, or that the act of 1872 so means to give the laborer a lien on any part of the crop, to which his employer never had title. On the contrary, we admit that the employer of labor has no right by that, or any

---

Brief for plaintiff.

---

other contract, to make a charge on the crop raiser, beyond any interest he may have had in it. We insist, however, that the legislature may, and has, by this act, regulated the priority of the liens, which a party having a crop or a partial interest in one, may create on his interest.

This power has been frequently exercised by the legislature, on the basis of the lien of mechanics. In reference to that lien, it has been held that as to the thing created by the labor of the mechanic, the legislature may give the mechanic, the creator, a prior lien over all others; but at the same time, it has been held, that this lien shall not bind any interest in the land not in the employer.

2. The theory of the agricultural lien law is this, that as the crop is the creation of labor, the laborer shall be first paid out of the crop, to the extent of appropriating to him all the crop in which the employer ever had an interest, and wholly unincumbered by any contract by which he has attempted to incumber it. He who has taken a lien from the employer before the crop is created (and this must always be done if such lien be prior in time to the hiring of the laborer) knows that labor must be employed to create the crop, and that the law secures such laborer by a lien; it must therefore be understood that he takes this lien, though prior in time, yet subordinate to the right of the owner of the crop to incumber it by contract necessary to create it. For without such labor the thing on which the lien is taken will never exist.

3. But independent of this, Buck is a purchaser without notice. The statement made to him that "there was some claim of some sort on it," was made by a stranger and conveyed no information to Buck. This information communicated no notice of an adverse title, nor did it give Buck the means of ascertaining who the adverse holder was. It was not intimated who was the adverse claimant, nor was any fact mentioned which could lead Buck to a knowledge of the claim. The mortgage was unrecorded, and if Buck applied to the records he would find no evi-

---

Brief for defendant.

---

dence of an adverse party holding them. We think the notice wholly insufficient. See *McLeod v. First Nat. Bank*, 42 *Misa*, 99; *Parker v. Foy*, 43 *Misa*, 260; *Shields v. Taylor*, 3 *Cashm.*, p. 21; 2 *Am. Lead. Cases*, p. 111, et seq.

*White & Chalmers*, for defendant in error:

We think that however this legal question might, in a proper case, be decided, the case at bar turns upon *the facts*, and that the verdict of the jury is right. Arlow Mince, a farmer, on February 14, 1873, executed to Payne & Raines, merchants, a mortgage on his crop, for supplies to draw to the amount of three hundred dollars, which mortgage was duly recorded. Several months thereafter, Thomas Mince, a son of Arlow, was employed by Arlow as a laborer, to be paid such part of the crop as disinterested men should adjudge to be right. Thomas Mince had both actual and constructive notice of the mortgage. He admits that he knew all about it. His family subsisted on the supplies, and J. A. Payne testifies that he furnished them to Thomas. The crop being made, two disinterested men, chosen by Arlow and Thomas Mince, without the knowledge of Payne & Raines, set apart for Thomas his part of the crop in the field. Thomas delivered one bale of cotton to the landlord Tait, and carried the bale in controversy to Nesbitt's Station, and sold it to Didlake, clerk of defendant Buck. Didlake was warned before purchasing, that the cotton was under mortgage; he consulted a lawyer, and remarked that "he would take the risk." Payne & Raines brought replevin, and recovered. That a jury of twelve honest men could render any other verdict, would seem impossible.

It is too evident to require argument that it was an attempt to defraud the mortgagee. Thomas Mince had promised to deliver the cotton to the mortgagee only two days before he sold it. In view of these facts, we say the verdict was right, irrespective of the legal question as to whether the lien of the mortgagee or of the labor on the cotton crop was superior.

The legal question is not presented by the record, and our client

---

Opinion of the court.

---

is not to be prejudiced thereby. The court below refused to decide the question because it was not presented.

The act creating the laborer's lien is to receive (secure) the payment of "wages for labor and liability for supplies." Acts of 1872, p. 181. The mode of asserting the right is plain. If the lien for labor is superior to that of a prior mortgagee, which we expressly deny, it is evident that the mortgagor and the laborer cannot privately agree that the laborer shall receive a certain part of the crop, and thus defeat the mortgagee.

It would be monstrous if two of the parties in interest, without the knowledge or concurrence of the other, can assign away the agricultural products, and by sale, divest the mortgagee, more especially when, as in the case at bar, the stranger purchasing is informed of the mortgage before purchasing. It will be seen that the only instruction given for the plaintiff, announced the doctrine that if Thomas Mince had any claim on the cotton crop of his father, it was a mere lien which was operating upon the entire crop, and that it was not competent for himself and father to set apart a particular part of the crop, and thereby give to him a perfect legal title thereto, divested of plaintiff's mortgage, and without the interposition of any court, and against plaintiff's consent. There is no error in this charge or in any part of the record. The instructions asked for defendant below were not applicable to the facts, and were properly refused.

SIMBALL, J., delivered the opinion of the court.

Three questions are presented by this record:

First. Whether a mortgage given by a lessee for supplies is superior to the lien of a laborer, employed by the lessee in its production, the mortgage being older than the contract to labor.

Second. Whether a purchaser of part of the crop (1 bale cotton) from the laborer gets a good title as against the mortgagee.

Third. Whether the purchaser (the mortgage not being recorded) had notice of the mortgage.

---

Opinion of the court.

---

The mortgage was executed the 14th day of February, 1873, and included the crops to be grown that year by Arlow Mince.

On the 6th of April, 1873, Thomas Mince engaged to labor for his father, Arlow Mince, on the terms that his services were to be valued by two disinterested men, and so much of the crop set apart to him, as they should think right. Such valuation was made, and a part of the crop in the field was assigned to him, he to pay the rent proportionally to the landlord.

The bale of cotton sued for by the mortgagee was picked from the part set apart to Thomas Mince, and was bought from him by Buck.

Has Thomas Mince a lien on the crop, under his contract of the 6th of April, 1873, superior to the mortgage of February 14th, 1873? Thomas had actual notice of the mortgage, although it was not recorded.

The first section of the act of April 5th, 1872, p. 131, gives a "first lien in law," upon all agricultural products, to secure payment of the wages of the laborer, whether, as we have held at this term, to be paid in money, or in the "products." This lien shall operate against the landlords, \* \* "and all other persons interested in such agricultural products." This statute took effect from its passage, and impressed the lien in favor of the laborer, on the products, against all the acts and contracts of the landlord, lessee, or whatever may be the interest of the employer of such laborer, in the crops. It is denominated "a first lien in law;" to give it, therefore, the virtue and force intended by the statute, it must take effect, as a limitation or restriction upon the power of the employer, by contract, mortgage, or by other act to defeat this first lien created by the law, to secure the wages of the laborer, out of the fruits of his industry. Since he contributes his labor to bring the agricultural products into existence, or in gathering them or preparing them for merchantable use, or domestic consumption, or in their transportation, the law imposes a "first lien" upon them for his wages. The idea is that the crops

---

Opinion of the court.

---

are produced and made valuable, fit for home consumption or market, by labor; therefore, labor shall be first paid. Whatever is over and above the demands of laborers upon it is subject to the control and disposition of the employer, whether landlord, lessee, etc., \* \* in any mode recognized by law. Whatever interest an individual may have in agricultural products, in "raising, handling, saving or transporting them," that person's interest is impressed with a lien for the wages of the laborer employed by or for him; and is a "first lien," in the sense that it is a limitation or restriction, upon the power of the employer, to create any other lien which shall be paramount to it. A mortgage for supplies would be inferior to the laborer's lien, for the intent and effect of the statute is to curtail and limit the dominion of the owner, or person interested, over the product, to the extent of liens that may arise in favor of those who bestow labor upon it.

The mortgage was executed after the passage of this statute. We therefore hold that it was subordinate to the right of the mortgagor to employ laborers, and thereby, by operation of law, create the lien in their behalf, and that, although such employment might be subsequent to the date of the mortgage.

We have recently (at this term) held that the act "for the encouragement of agriculture," of 18th February, 1867, was in force until repealed in October, 1873. The 13th section of the act under consideration declares, as the sense of the legislature, that all contracts under the act of February 18, 1867, are valid. Quite surely, they would be valid without such declaration. But we understand the legislature as saying, that we are introducing a new class of liens, which may come in conflict with those that have been authorized by the previous statute. Our intention is, that all contracts made under that statute shall stand and be valid. Our purpose is not to impair them.

The 7th section of the act of 1867, pp. 571, 572, makes it lawful to mortgage or convey in trust, a crop, \* \* being produced or to be produced within fifteen months from the date of such



---

Opinion of the court.

---

instruments. The intent of allowing such hypothecation of the crop so long in advance of its "being produced," was to enable the agriculturist, before "sowing the seed," to make provision to carry on his business. The purpose of the statute is proclaimed in its title to "encourage agriculture," then greatly depressed, by enabling those engaged in it to get the means and appliances to prosecute that industry. They should not be required to wait until the seed was sown before making the necessary financial arrangements of the year. The means must be secured beforehand, so that the agriculturist may know how many laborers he can employ, how much food, how many animals to provide, etc. To give effect to that intent which is conveyed by the language, the mortgage or deed of trust takes preference from its date, as to subsequent incumbrances, but subject to this qualification, that if given after the passage of the act of the 5th April, 1872, it is inferior to the liens created by the 1st and 10th sections.

When Payne & Raines took the mortgage from Arlow Mince, it was subject to his right to employ laborers, and subject to the "first lien," which this act of 1872 created in their behalf.

This mortgage operated on Arlow Mince's crop, subject to the lien in favor of Thomas.

But there was testimony which tended to show that Thomas waived his prior right in favor of the mortgagee. In that aspect of the case, without expressing any opinion on the weight of that testimony, it becomes necessary to consider the claims of Buck as a purchaser, for value, without notice of the mortgage, and whether his rights, in that character, were fairly presented to the jury under the instructions of the court.

2d. Is Buck a *bona fide* purchaser without notice of the mortgage to Paine & Raines?

The testimony on the point is to the effect, that when Didlake, the clerk of Buck, was negotiating to levy the cotton, the witness, James, "told him that there was some claim of some sort upon it, that [he had better look out. Didlake then went off and consulted a lawyer, returned and said he would take the risk."

---

Opinion of the court.

---

The rule is, that whatever will put a party upon inquiry, which, if pursued with ordinary diligence and understanding, would lead to knowledge of the requisite fact, is notice of it. *McLeod v. First Nat. Bank*, 42 Miss., 112. A subsequent purchaser or creditor, about to deal with the property, if they have notice of a prior claim or equity, or of facts, which, if followed up, will discover the truth, are put under a duty to make the investigation; and if they fail to do so, are chargeable with knowledge which the inquiry would have disclosed. *Parker v. Foy & Florer*, 43 Miss., 260.

It is laid down as a rule by 2 Sugden on Vendues, 523, "that the purchaser is not bound to attend to vague rumors, to statements by mere strangers; the notice must proceed from some person interested in the property." In *Wailes v. Cooper*, 24 Miss., 228, the notice of the unregistered mortgage was given by Hale, the vendor. "The notice thus communicated is (say the court) all the notice required by the statute." "It was not a mere floating rumor, circulated by irresponsible persons, which, perhaps, the party might have disregarded."

The mortgage takes effect as to creditors and purchasers, from the date it is filed for record, and is void as to subsequent creditors and purchasers without notice, unless recorded. The *fact* which must be brought home to the subsequent purchaser, is notice that the unrecorded mortgage exists. When, therefore, the cases refer to knowledge of "circumstances" which shall put a party on inquiry, the circumstances themselves must come from a responsible source, and be of a character which, if followed up, will lead to the requisite information. Such is the effect of the open, visible possession by the vendee. As possession presumptively follows the right, a purchaser or creditor is thereby warned to inquire "by what right the occupant holds." The information which Buck's clerk had was, "that there was some claim of some sort upon upon the cotton." The witness had no interest in the cotton, and from the vague and indefinite language used, did not

---

Opinion of the court.

---

know the nature of the claim, whether by judgment, mortgage or joint ownership, etc., nor to whom the claim belonged. He disclosed no circumstance which pointed to the mortgage, nor did he indicate any person who asserted any sort of claim. If Dilake had examined the judgment roll or the registry books, he would have found neither judgment nor mortgage. Was he under an obligation to search further? If so, to whom should he go? It is not necessary to the exigencies of this case, to go as far as to hold that notice of an unregistered deed may not be given to a purchaser or creditor by a stranger who has no interest in the property, as laid down by Mr. Sugden. That doctrine in the breadth stated by him has been questioned, and we make no committal on the subject. Dart on, V. & P., 402, 403, chap. XV.

This vague information to Buck's agent was not of the character to put him on inquiry, and did not amount to notice.

We have already said that the mortgage of Arlow Mince was subordinate and subject to a right in him to employ labor, and that for the wages, the law raised a "first lien," which would be superior to the mortgage. There was in this case testimony tending to show that Thomas Mince engaged to work with his father, with knowledge of the extent and scope of the mortgage, and with a recognition on his part of its terms; and an acquiescence of the rights conferred by the mortgagee, and a waiver of his own. The instruction granted for the mortgagees, Paine & Raines, was in effect, that the mortgage was superior to the lien of the laborer. That view of the law is not in accordance with the views hereinbefore expressed. It is also erroneous in not distinctly presenting to the jury (in view of the testimony of waiver by Thomas Mince), the further proposition that if Buck was a *bona fide* purchaser, without notice, that is ample protection of his right to the cotton.

If, therefore, the jury should be satisfied from testimony, that Thomas Mince waived his right, in favor of the mortgagee, nevertheless he was the owner of the cotton subject to the mortgage, and a sale of it to Buck, an innocent purchaser, would pass to him a good title.

---

Statement of case.

---

For these errors the judgment is reversed, and the cause is remanded for a new trial.

---

## JOHN D. PALMER v. B. JONES, et al.

## 1. SCIRE FACIAS — REVIVOR OF JUDGMENT — STATUTE OF LIMITATIONS.—

Where R. P. recovered judgment against J., et al., on the 5th day of March, 1867. The plaintiff died, and J. D. P. became the administrator, and sued out a writ of *scire facias* to revive the judgment on the 5th day of August, 1874. Held, that the action was barred by the statute of limitations of seven years. Code of 1857, art. 8, page 400; Code of 1871, § 2153. No execution having issued on the judgment, had the plaintiff been living at the time of the issuance of the *scire facias*, he could not have revived the judgment. The administrator does not stand in a better attitude.

ERROR to the Circuit Court of Tippah County.

On March 5, 1867, a judgment was recovered by Randal Palmer against B. Jones, Wm. Persons and S. R. Spight, for \$274.80 in the circuit court of Tippah county.

On the 8th day of July, 1874, at the instance of John D. Palmer, administrator of Randal Palmer, a suit of *scire facias* was issued against the judgment debtors for the revival of the judgment, and for the purpose of obtaining a writ of execution.

The judgment debtors at the next term of court made a motion to *quash* the writ of *scire facias* upon the ground that seven years had elapsed since the rendition of the judgment.

This motion was granted, and the writ quashed, and the *scire facias* proceeding dismissed.

From this judgment the plaintiff in error brings the cause to this court by writ of error.

Frank Johnston, for plaintiff in error:

The only question presented is, whether the proceeding by *scire facias* is barred by limitation.

At common law a judgment did not constitute a lien on the

---

Brief for plaintiff.

---

debtor's property, and until the writ of *elegit* was given by statute in England, the land of the debtor could not be reached. The lien was created by the levy under the execution. Judgment liens, as now commonly spoken of, were unknown to the common law. Before advertng to our statutes, it would be well to ascertain the common law on the general question before the court.

At the common law an execution could be had any time within a year and a day after the rendition of the judgment. And an alias writ could be had at any time, provided the first execution had been issued within the time stated. If no execution was issued within the year and day, then a writ of *scire facias* was necessary to revive the judgment for execution. 2 Tidd's Prac., 994 and 1103. If after revival by *scire facias*, an execution is not issued within a year and a day, the plaintiff can proceed again by *scire facias*. Ibid, 1106.

The rule as to limitation at common law can be thus stated: After a lapse of twenty years the presumption of payment arose, and this presumption was applicable, not only to an action of debt on the judgment, but to the proceeding by *scire facias*. 1 Tidd, 18, and note 2.

After the expiration of twenty years, the plaintiff was not entitled in the first instance to a writ of *scire facias*, but to an order against the defendant to show cause. Ibid, 1105.

The precise effect of this presumption of payment, and the evidence necessary to rebut it, are questions unnecessary to be considered. It may be said that a judgment at common law could be revived by *scire facias* at any time within twenty years after its rendition.

The next inquiry is, what change in the common law has been made by the statutes in this state?

By art. 15, Code, 1857, p. 401, the *lien* of a judgment is limited to a period of seven years from the date of the judgment. But this provision can have no effect on the proceeding by *scire facias*, as the lien given by the statute is quite distinct from the enforce-

---

Brief for plaintiff.

---

ment of the judgment by final process. *Hastings v. Cunningham*, 89 Cal., 137.

Art. 11, Code, 1857, p. 400, contains a limitation of four years on proceedings by *scire facias* against executors and administrators. But this does not relate to cases where the purpose of the writ of *scire facias* is to have execution, and where there has been no change of parties.

Art. 8, Code of 1857, p. 400, provides that no execution shall issue after seven years from the date of the last preceding execution.

There is no express limitation on the writ of *scire facias*, nor does it provide that the judgment shall be held to be satisfied after the lapse of seven years from the date of the last execution. It was intended simply to restrict the time within which an execution could be had without a revival of the judgment by writ of *scire facias*. The rule at common law which was designed to be repealed was, that if the original suit of *fieri facias* issued within a year and a day, then the plaintiff could have *alias* writs at any time thereafter. 2 Tidd's Prac., 1103; 5 How., 175; 2 George, 435. Under this statute, if the plaintiff had his original execution within a year and a day, he could have an *alias* writ at any time within the seven years; after the expiration of that time, he could not have an execution without reviving the judgment by writ of *scire facias*.

The first clause of sec. 8, Act of 1844 (Hutch. Code, 880 and 881), provided a limitation on the writ of *scire facias*; the last clause was identical with art. 8, Code, 1857 (*supra*). In *Abbey v. Commercial Bank*, 2 George, 436, the court treated the *first* and *not the last* clause of section of the Act of 1844, as imposing the limitation on the proceeding by *scire facias*.

It will be seen that this first clause is not reenacted in either the Code of 1857, or the Code of 1871, but only the *last* clause of the Act of 1844 (sec. 8), which did not contain the limitation, is embodied in the Codes of 1857 and 1871. There is no other pro-

---

Opinion of the court.

---

vision of law bearing on the subject other than those referred to. It is respectfully submitted that art. 8, Code of 1857, and § 2153 of the Code of 1871, which is in the same language, do not prescribe any limitation on a proceeding by *scire facias* to revive a judgment for the purpose of having execution.

*Kimbrough & Abernathy*, for appellees :

Judgment sought to be revived was rendered 5th March, 1867. *Scire facias* to revive issued 8th day July, 1874. Same parties made defendants, not seeking to make new parties liable.

The statute of limitation, interposed by motion, which says more than seven years have elapsed since rendition of judgment, issuance of last execution or *scire facias*.

A writ of *scire facias* is in the nature of an action on the judgment. 1 H., 267; *State Bank v. Vance*, 9 Yer., 471. Action on judgment barred by seven years. Revised Code 1871, § 2155. *Scire facias* to revive a judgment seems to be proper only where it is sought to charge some new parties, or a year and a day have elapsed without execution, and less than seven years. *Locke v. Bradey*, 1 George, 21.

PEYTON, C. J., delivered the opinion of the court :

It appears from the record in this case, that Randal Palmer, on the 5th day of March, 1867, recovered a judgment in the circuit court of Tippah county, against B. Jones, William Persons and S. R. Spight, for the sum of two hundred and seventy-four 30-100 dollars. That subsequently to the rendition of the judgment, the said Randal Palmer died, and John D. Palmer became administrator of his estate, and sued out from said court, on the 8th day of July, 1874, a writ of *scire facias* to revive said judgment in his name, and to have execution thereof.

On the 5th day of August, 1874, the defendants moved the court to quash the *scire facias* on the ground that it appears from its face to be barred by the statute of limitations of seven years. The motion was sustained by the court, and the writ quashed. And hence the case is brought to this court.

---

Opinion of the court.

---

The Code of 1857, in article 8, page 400, provides that all actions of debt, founded on any judgment or decree rendered by any court of record in this state, shall be brought within seven years next after the rendition of such judgment or decree, and not after ; and no execution shall issue on any such judgment or decree after seven years from the date of the issuance of the last preceding execution on such judgment or decree. And this provision is also contained in section 2153 of the Code of 1871. And it is declared in both of these codes that no judgment or decree, rendered in any court held within this state, shall be a lien on the property of the defendant therein for a longer period than seven years from the rendition thereof.

It does not appear that any execution had ever issued on the judgment, and in that case the statute is an absolute bar to the bringing a suit or action on the judgment, and to the issuance of an execution thereon.

One of the purposes of the *scire facias* is to have execution of the judgment, and this cannot be had, because the statute prohibits it, and the other purpose of the writ is to revive the judgment in the name of the personal representative of the plaintiff therein. Had the plaintiff in the judgment been living at the time of the issuance of the *scire facias*, he could neither have brought an action on the judgment, nor run an execution thereon. If this be so, it would be a nugatory act to revive in the name of the administrator, who could have no more rights, nor stand in any better position with reference to the judgment and execution, than his intestate would have had, had he been living.

The record shows that the bar of the statute was complete, and therefore the court did not err in quashing the *scire facias*.

The judgment must be affirmed.



---

Syllabus.

---

## PLANTERS' INSURANCE COMPANY v. B. D. COMFORT.

1. **INSURANCE — MUTUAL PLAN.** — Among the features distinguishing such companies from those who insure upon a capital paid up or secured are, that each insurer becomes a member of the association. The capital is composed of premiums earned in the business and deposit notes. The deposit notes constitute the reserved fund, to be used as the necessities of expenses and losses require. The insurers become the mutual indemnifiers of each other against damage and loss from the elements insured against.
2. **SAME — SAME — MODE OF OBTAINING CONTRIBUTIONS.** — The mode of obtaining contributions from the makers of deposit notes, is to assess each liable for the loss and expenses with a *pro rata* assessment of a just proportion, and require its payment on due notice. This amount is determined by the directory and must be assessed ratably on the deposit notes of those whose policies were in existence at the date of the loss. Responsibility to contribute to a loss begins when the insurance has been effected, and terminates when the policy expires.
3. **SAME — SAME — DUTY OF THE COMPANY.** — It is the duty of the company to show before making the assessment, that the loss occurred during the terms of the policies of those assessed, and that all the members under a duty to contribute were assessed; and the company should collect by suit, if necessary, the amount due by delinquents on assessments.
4. **SAME — SAME — FORFEITURE OF POLICY.** — When an assessment is not made in accordance with the charter upon a deposit note, the failure to pay such an assessment does not work a forfeiture of the policy under the charter.
5. **SAME — PROOF OF LOSS — CASE IN JUDGMENT.** — The policy requires all insured to make out within thirty days a statement under oath, etc., of the loss. This is a condition precedent to the right of the assured to recover. C., within the required time, notified the company of his loss. The company replied to this, repudiating all liability on the ground of nonpayment of assessment. *Held*, that such an act was a waiver by the company of any further proof of loss by C.

ERROR to the Circuit Court of Hinds County. Hon. GEORGE F. BROWN, Judge.

The facts of case appear sufficiently in the opinion of the court.

---

Brief for plaintiffs.

---

*T. J. & F. A. R. Wharton*, for plaintiffs in error, argued the case orally, and insisted :

I. That the circuit court erred in overruling the demurer to the 2d count of the declaration. As this count virtually incorporated in it the policy of insurance, it should have been sustained, if for no other reasons than because it did not contain any allegation sufficient to show that the payment of the assessment money had been prevented by some act of the defendants ; nor any reason why this could not have been paid after the first week in January, 1871, and previous to the burning of the building, on the 9th day of June, 1871.

II. The circuit court erred in admitting as evidence, the *ex-parte* affidavit of the plaintiff, and the certificate of the clerk of the circuit court of Attala county. These were only intended, between the parties of this suit, as preliminary proofs of loss. These were only intended as information to the insurance company, and to enable it to determine whether they would pay for the loss of the building. *Flanders on Fire Ins.*, pp. 527, 528, sec. 6.

III. The judgment of the circuit court was erroneous, because the plaintiff failed to establish by legal evidence, either of the following essential allegations of his declaration :

1st. That the building was destroyed by fire, *and not by means of any of the excepted causes contained in his policy of insurance.*  
2d. That it was so destroyed *during the continuance of his policy of insurance*, and without default on his part.

Besides the preliminary proofs, before referred to, and the testimony of the plaintiff upon information from others, there was no evidence whatever, either that the building had been burned, or that the loss of the building did not result from any of the excepted causes contained in the policy of insurance. In such condition of the case, the plaintiff was not entitled to recover for the loss of the building, even if he had proved the actual payment of the assessment of \$36. This position is too fully sustained by

---

Brief for plaintiffs.

---

every rule of pleadings to require any citation of authorities to support it.

The attempt to establish by evidence, the burning of the building during the continuance of the policy of insurance, either by proof of a legal tender of the assessment, or by proof to excuse such tender, utterly failed. No reliance was based upon an offer to pay this to E. M. Wells, and the proof showed he was not authorized to receive it. The plaintiff did not attempt to prove any tender of this by J. C. Lucas, his agent; he only attempted to prove that Lucas could not make such tender at the office in the city of Jackson, because there was no agent in said office on the 2d, 3d or 4th of January, 1871. This was contradicted by T. E. Helm and M. A. Van Hook, officers of the insurance company. Lucas testified that he went to this office on the day before the legislature met in January, 1871, or on the day it met, and again on the next day, to pay the money, and that he did not make any subsequent effort to pay it. The journals of that legislature show that it assembled on Tuesday, the 3d day of January, 1871; so that he made no attempt to pay this money after the 4th day of January, 1871, which was eleven days previous to the time allowed in the notice of the assessment for the payment of this money, and more than five months before the building was burned. And yet the plaintiff was allowed, under his policy of insurance, to protect himself against this loss *by the payment of this assessment at any time previous to the burning of his building.*

Under the special conditions of the policy of insurance, the stipulations contained in the application for its issuance, and the 16th section of the charter of this insurance company, this policy became void on the 15th day of January, 1871, because of the default of payment of the assessment of \$36.

The defendant in error, in accepting this policy of insurance, became a member of this insurance company during the continuance of his policy, and was bound by the provisions of the act incorporating it, and by its by-laws. See sec. 6 of the charter of incorporations; also Flanders on Fire Ins., p. 522, sec. 12.

---

Brief for plaintiffs.

---

The stipulation in the application for this policy of insurance, and in the policy itself, to the effect that the policy should be void on failure to pay any assessment for losses, etc., constitutes a warranty on the part of the defendant in error, and estops him from setting up any matter to excuse a default in the payment of such assessment, except some positive act on the part of the insurance company which made it impossible for him to pay it at any time previous to the burning of his building. See *Flanders on Fire Ins.*, pp. 204-205, sec. 2; also pages 207 and 210.

This rule should be rigidly enforced in this case for the following reasons: 1st. Because, as before shown, the defendant in error could, by a payment of this assessment at any time previous to the burning of the building, have caused this policy of insurance to stand again as a security against such loss. 2d. Because the defendant in error elected his own agent for the payment of this assessment money, instead of sending it by express, as he was positively required to do in the notice of such assessment. 3d. Because of the condition in the policy of insurance which declared it should be void upon any failure of the assured to comply with its conditions. *Flanders on Fire Ins.*, p. 132, sec. 3. 4th. Because under the 1st and 22d sections of the charter of the insurance company, the provisions of said charter are required to be construed liberally in favor of the company.

There is no such conflict between sections 15 and 16 of the charter of this insurance company as was contended for in the circuit court by counsel for the defendant in error. If construed according to the rule established by this court, to the effect that statutes must be construed so as to give effect to all of their provisions, wherever this can be done, there is no conflict whatever between these sections.

Under the 15th section, the insurance company is authorized, on default of payment of any assessment, to sue for and recover the whole of the deposit note of the assured, and the money so collected "shall remain in the treasury of the company, subject

---

Brief for defendant.

---

to the payment of such loss or losses and expenses as have or may thereafter accrue."

In addition to this right, and as a cumulative remedy or means to enable the insurance company to keep itself at all times in condition to comply with all of its legal obligations, the 16th section not only excludes and debars the assured, upon failure to make such payment of assessments, of "all benefit and advantage of his, her or their policy of insurance respectively, for and during the term of such default or nonpayment," but provides, also, that the assured "*shall be liable to pay all assessments that shall be made during the continuance of said policies of insurance.*"

But if mistaken as to this being the proper construction to be given to these sections, we then submit that the only other reasonable construction which the language used will justify, is this: that the legislature intended to allow the insurance company to elect, upon such default of payment, to sue for and collect the whole of the deposit note, as provided for in the 15th section, or, under the 16th section, to avoid all liability on the policy, upon proof of such default of payment.

As no attempt was made in the pleadings to avoid the liability of the defendant in error for the payment of the assessment of \$36.00 on account of losses which accrued under policies of insurance issued previous to the one sued on in this case, that question cannot be adjudicated on this record.

IV. We submit that the judgment of the circuit court was wholly unsupported by *competent* evidence in the cause, and should be reversed. It certainly was against "the strong preponderance" of the evidence, and "clearly wrong." *Brown v. Forbes*, 8 S. & M. Rep., 498, on p. 504; *McAlexander v. Puryear*, 48 Miss. Rep., 420, on 422.

*Harris & George*, for defendant in error:

I. Reviewed the facts of the case at length and also the charter of the company, and with reference to the latter they insisted that the company was purely a mutual one, and that the company had

---

Brief for defendant.

---

no power to make assessments on the deposit notes, except on these conditions: 1. That there was not money enough in the treasury of the company to pay losses. 2. That each policy holder was only liable for losses occurring whilst he was a member of the company. 3. And that in making the assessments the company was bound to assess all the solvent members, and they were also bound to collect from solvent defaulters, on a prior assessment what was due by them.

They insisted that the assessments were not made in accordance with these conditions.

To show that the company was mutual, notwithstanding the power to receive all cash from any particular insurer, they cited *Union Ins. Co. v. Hoge*, 21 How. S. C., 35; *Ohio Mut. Ins. Co. v. Marietta Woolen Factory*, 3 Ohio (N. S.), 348; *Flanders on Ins.*, 137-8.

The company must show affirmatively that the assessments were legal. *Atlantic Mutual Ins. Co. v. Fitzpatrick*, 2 Gray, 279; *Flanders on Ins.*, 136; *Pacific Mut. Ins. Co. v. Guse*, 49 Mo., 329; *Long Pond Ins. Co. v. Houghton*, 6 Gray, 77; *Thomas v. Whallon*, 31 Barb., 172; *In re Bangs*, 15 ib., 264; *Am. Ins. Co. v. Schmidt*, 19 Iowa, 502; *Savage v. Medbury*, 19 N. Y., 32; *Bangs v. —*, 18 ib., 592; *Herkimer County Mut. Ins. Co. v. Fuller*, 14 Barb., 373; *Devendorf v. Beardsly*, 23 ib., 656; *Appleton Mut. Ins. Co. v. Jesser*, 5 Allen, 446.

That each member is only liable for losses occurring whilst he was a policy holder, and that it is the duty of the company to show that the assessment was made to pay such loss, see *Wilson v. Ins. Co.*, 19 Penn., 372; *Savage v. Medbury*, 19 N. Y., 36; 23 Barb., 656.

That it is fatal to the assessment that certain members were omitted. *Marblehead Ins. Co. v. Hayward*, 3 Gray, 209. The deposit notes of the defaulter should have been collected. *Bangs v. Gray*, 15 Barb., 264; S. C. 12 N. Y., 485.

II. The tender to Wells, the agent, and the offer by Lucas to

---

Opinion of the court.

---

pay in the office of the company, were sufficient. No officer was present to receive the money. It was the duty of the company to have an officer present. It was their failure, not Comfort's, that caused non-payment. In such a case they cannot insist on a forfeiture. 2 Cruise Dig., p. 33; 2 Robinson's Pr., 71; 2 Bac. Abr. tit. Conditions (O.), sec. 2, paragraph 2, p. 312; *ib.*, 315; *Williams v. Bank of U. S.*, 2 Peters, 102; *Marshall v. Craig*, 1 Bibb. (on page 390); *Majors v. Hickman*, 2 Bibb., 218.; *ib.*, 431.

SIMRALL, J., delivered the opinion of the court.

This suit was brought by D. B. Comfort, against the Planter's Insurance Company (a corporation created by the laws of this state), on a policy of insurance, to recover \$3,000, the amount of the risk taken by defendant on plaintiff's dwelling house, against damage and loss by fire. The house was destroyed by fire during the term of the policy. It was not controverted that the assured was owner of the property, nor that it was of equal or greater value than the sum named in the policy.

But the defense is rested mainly on two grounds. First, that the assured was in default at the time the loss occurred, in the payment of \$36, which had been assessed by the company on his deposit note of \$180; and that the effect of such default by the underwriter's charter of incorporation and covenant in the policy was to make invalid and of no effect, the policy, so long as the assured suffered the assessment to remain unpaid.

The Planters' Insurance Company was organized on the mutual plan, which has certain characteristics common to all companies doing an insurance business on that theory. Among the features which distinguish such a company from those who insure upon a capital paid up or secured, are these: Each person who insures his property becomes a member of the association. The capital is made up of premiums, earnings in the business, and deposit notes. The deposit notes constitute, as it were, a reserved fund to be called in as the necessities of expenses and losses require.

---

Opinion of the court.

---

The insured become the mutual indemnifiers of each other, against damage and loss from the elements insured against. The funds out of which damages and losses are to be paid are the premiums, the earnings and deposit notes. The mode of obtaining contributions from the makers of deposit notes is to assess upon each, liable for the losses and expenses of the company, a pro rata assessment of a just proportion, and require its payment on due notice.

An examination of the charter of the company, session acts 601 to 609, will discover that its scheme of insurance contained all of these features. "Deposit notes may be received from the insured, which notes shall be paid at such times and in such sums as the directors may from time to time require, for the payment of losses or expenses. The directors or executive committee shall fix the amount each person shall pay at the time of making application for insurance." Sec. 6.

Every person who shall become insured, also his heirs, executors and assigns, continuing to be insured therein, shall be deemed and taken to be members thereof, during the time specified in their policies, *and no longer*. Sec. 7.

The members shall be bound to pay their proportion of all *losses, during the time* for which they were insured to amount of their notes. Sec. 8. In case there shall not be sufficient money in the treasury to pay any loss, the directors may settle and determine the sums to be paid by the several members thereof, as their respective portions of such loss, according to the amount of their several deposit notes, notice of which shall be sent. The amounts thus assessed shall be paid into the treasury within thirty days after notice sent. Sec. 15.

A refusal to pay an assessment for thirty days, which has been duly ordered, shall cause a loss of all benefit or advantage of the insurance, for and during the term of such default. Sec. 16.

The cash premiums and deposit notes shall constitute the capital stock. But a guarantied capital not exceeding \$500,000 may be added. Sec. 18.



---

Opinion of the court.

---

Every person who effects an insurance becomes a member of the company, and is bound to pay his proportion of losses happening during the time he was insured. The amount thus to be paid is settled by an assessment on the deposit notes. For a refusal promptly to respond to this assessment duly made after notice, the policy is suspended and becomes of no effect, so long as the particular member is in default.

The defendant, through Van Hook, its chief officer, based its refusal to pay Comfort the amount of the risk it had taken on his dwelling house, upon the ground that at the time the house was consumed by fire, Comfort was recusant, in paying the assessment of \$36, his due proportion of his deposit note, and that under the sixteenth section of its charter, the policy was suspended and inoperative.

The plaintiff attempted to obviate that defense in two modes: First. That the assessment was illegal, and, therefore, he was under no obligation to pay it. Second. That he made a tender of the money, or made reasonable efforts to pay at the defendant's chief office of business.

The engagement of the members (all the insured are members) to and with each other is, that they will make good to one another all damages and losses, arising from the element insured against. That is the obligation of the insured with each other, contemporaneously holding policies. But this mutual obligation is worked out by the company in the mode prescribed in the fifteenth and sixteenth sections, viz: When a loss happens, if there be no money in the treasury, then the assessment shall be made and collected.

The deposit notes are made by the charter, of the nature of a reserved fund, to meet expenses and losses, whenever there is not money enough in the treasury, derived from premiums, which are primarily devoted to those purposes. The members of the company are perpetually changing, by the expiration of policies and new insurances. When the contingency arises to make and collect

---

Opinion of the court.

---

an assessment, it must be settled on these principles: First. The directors are to determine the amount to be called in. Second. That sum must be apportioned, ratably, upon the deposit notes of all the insured, whose policies were in existence, unexpired, at the date of the loss. The person who effects an insurance to-day is not liable for a loss which occurred yesterday. Responsibility to contribute to a loss begins when the insurance has been effected, and terminates when the policy expires. It would follow, therefore, that whatever would dissolve the connection of the insured with the company, would absolve him from all assessments, except such as had been previously made. Such would be the effect of the surrender and cancellation of a policy. When the policy, with the consent of the underwriter, is given up and cancelled, the deposit note goes with it. Both are constituent parts of one transaction. *Flanders Fire In.*, 23.

The officers of the company have, at all times, information from their papers and records, of the data necessary to be considered in making the assessment. They have information of the times and amount of losses; of who are insured at such dates, and of the deposit notes. They can readily make proper apportionments. It would rest upon the underwriters properly to show that the assessment was one to which the assured is bound to contribute. *Atlantic Ins. Co. v. Fitzpatrick*, 2 Gray, 297. Since the insured is only liable for his proportional part, in common with others, for a loss which happened while his policy continued, and is not responsible for losses which accrued before he became a member, or after his policy expired, it would seem to be a logical consequence that the underwriter must show a state of facts which authorizes the assessment to be made. One of those facts is, that the loss took place during the term of his policy. *Insurance Company v. Harvey*, 45 N. H., 298; *Long Pond Ins. Company v. Houghton*, 6 Gray, 77-82. Another fact to be shown is, that all the members under a duty to contribute were assessed. This is necessary, in order that the burden, which is common to all,

---

Opinion of the court.

---

shall be equitably and equally distributed. *Herkimer Company v. Fuller*, 14 Barb., 375; *Bangs v. Gray*, ib., 272; *Ohio Company v. Marialla*, 3 Ohio St., 350; *Insurance Company v. Harvey*, 45 N. H., 298; *Hart v. Achilles*, 28 Barb., 576; *Dana v. Munro*, 38 ib., 528.

Van Hook, the secretary of the defendant, explained the circumstances connected with the assessments. First, a resolution of the directory, of 2d August, 1870, to the effect that each deposit note given after the 1st April, 1869, (and not heretofore assessed), be assessed 20 per cent., to meet losses and expenses incurred, etc. On the 7th Dec., 1870, another resolution was passed, making a further assessment of 20 per cent. on all the deposit notes held by the company, payable within 30 days after the 15th December. Notice was given to Comfort of his assessment, which expired on the 15th January, 1871. The assessment had been made *to meet losses which had occurred*. The assessments were made on all the mutual policies \* \* without reference to the dates of the losses. More than half the members refused to pay the first assessment; no compulsory efforts by suits were made to compel payments. The second assessment was made with a view of raising the funds needed from the policy holders, other than those who were delinquent on the first assessment. The witness also said that the second assessment was made on all the deposit notes held by the company.

The 16th section of the defendant's charter (already referred to) by way of penalty upon the member who refuses to pay promptly his assessment, "excludes and debars him of all benefit and advantage of his insurance during the term of such default; but, nevertheless, he shall continue liable to contribute to losses until his policy expires by limitation." In addition, by the terms of the preceding section, upon failure to pay the assessment, the company may sue for and collect the whole amount of the deposit note, and the money shall be subject to the payment of losses and expenses which have or may thereafter accrue. Where such

---

Opinion of the court.

---

serious consequences are visited upon the insured for a failure to perform his part of the contract, the underwriter ought to be held to a fair and substantial compliance on his part.

Comfort, as already observed, was under an obligation if the necessity arose, to pay his proper proportion to the funds of the company. The rule by which his share of the contribution is to be ascertained is distinctly pointed out in the charter. First, the gross sum, the aggregate of losses, or of losses and expenses accrued since each became a member by insurance of his property. That sum is distributed ratably among all mutual policy holders, who were such during the time the losses and expenses accrued. If, therefore, the company sustained a loss before Comfort became a member, he cannot be assessed for it, but the money must be raised from those who were at that time insured. Each insured may be made answerable to the full amount of his deposit note, for losses happening during the term of his policy, but for no other.

It appears that both assessments of August and December were made to cover losses and expenses that had been sustained as well before, as during the term of Comfort's policy. If for prior losses, he is in nowise liable for them. It is incumbent on the defendant, in order to sustain this branch of its defense, to show a proper assessment, authorized by its contract with Comfort, and its charter and by-laws. The terms of the deposit note did not bind Comfort to pay the \$180, the sum named in it, absolutely. The words are, "in such portions and at such times as the directors of said company may, agreeably to their their charter and by-laws, require to pay the expenses and losses." The charter and the by-laws made in agreement with it, are the criterion to determine the validity of a particular assessment.

In order then that the defendant may claim the benefit of the forfeiture denounced by the charter, and repeated in the policy, it must show that losses had accrued for which Comfort was liable. That proof was not definitely made by the defendant.

---

Opinion of the court.

---

But the charter plainly intends, and it is so expressed, that those who share the burden must equally (proportioned to their insurance and deposit notes) contribute to it. But it was proved that not half of the members paid the first assessment. (Comfort, however, paid his.) That made the second assessment larger than would have been necessary, and increased the amount demanded from those who were prompt. We do not mean that if the apportionment is not made with strict accuracy, it will be vitiated. But the charter requires that the rule of equality must be substantially observed. We do not doubt that insolvent makers of these notes may be altogether rejected from the computation, and the assessment be made with reference to those that are solvent.

But great injustice is done to those who pay punctually, if the company does not avail itself of the means it has of compulsory payments. The charter gives the company the extraordinary security of a lien on the buildings insured and premises, for the deposit notes. It is highly probable that the failure to collect from the delinquents under the first assessment, increased the last assessment upon all who had paid five per cent. Upon refusal to pay within thirty days the first assessment, the company could have recovered the entire amount of the deposit notes from delinquents, and would have had the right to appropriate out of that fund to liquidate future assessments as to such parties.

It was plainly the duty of the company to have enforced collections from these delinquents by suits, if necessary. If that be not done, it becomes impossible to equally apportion losses and expenses among the members. We are of opinion, therefore, that it was not shown in evidence that the assessment in December upon Comfort was imposed according to the charter of the defendant. The company had no right to demand its payment, and it does not have the effect upon his policy of insurance denounced by the 16th section of the chapter.

If the assessment was improperly made, and could not be col-

---

Opinion of the court.

---

lected by suit, manifestly, it ought not to have the effect of suspending and annulling the policy, so long as the default continued.

It was argued for the plaintiff in error, though not much pressed, that Comfort did not supply the requisite proof of loss, and that it was error to have admitted in evidence on the trial the preliminary proofs of loss, being his own affidavit and the certificate of Webb, the clerk. One of the covenants in the policy is, that the insured shall, within thirty days, make out a full statement of his loss, and procure the certificate of a notary public or clerk of a court of record, reciting certain matters pointed out in the policy. These papers were competent evidence of a compliance by the assured with his covenant. Although they are meant for the information of the underwriter, to enable the company to make full investigation as to the cause and amount of the loss, so as to determine whether it will adjust it or not; yet it is also a condition precedent to the right of the assured to recover. *Flanders Fire Ins.*, pp. 527, 528. And competent evidence of a compliance with the policy. *Ib.* But are not evidence of the quality and quantity of the goods or property lost. In response to Comfort's letter, notifying the company of the loss, the secretary promptly replied repudiating liability of the company on the ground of nonpayment of the assessment. That relieved the assured of the duty of presenting preliminary proofs. They could be of no value to the underwriters, and such act is accepted as a waiver of them. *Post v. Ætna Ins. Co.*, 43 Barb., 351; *Clark v. Ins. Co.*, 6 Cush., 342.

But the plaintiff in his testimony stated that his house was burned the 9th of June, 1871, and that it was of the value of \$5,000, and the day after the fire he sent the preliminary proofs to the secretary. Mr. Van Hook promptly replied, expressing sympathy for the loss, but refusing to entertain the question of adjustment for the reason already stated.

The building in the application for the insurance was valued at

---

Opinion of the court.

---

\$5,000. Lucas, in his testimony, mentions incidentally that the plaintiff's house was burned. It is manifest from the record that the defendant did not by testimony controvert in the circuit court that the building was consumed by fire, and was of greater value than the risk assumed. The defense was placed in that court upon the position originally taken by Van Hook. If the proof on these points was not as full as it might have been, it was because the real controversy was over the position originally taken by the defendant.

In view of the result reached on the first question, it is unnecessary to consider the other points made by the defendant, viz: The decision of the circuit court overruling the demurrer to the first count of the declaration, and whether a tender was actually made of the \$36 to Webb, agent, and if made, whether it would have availed the plaintiff, and also whether the efforts to pay that sum at the principal office in Jackson had the effect of relieving the plaintiff from a suspension or temporary annulment of the paying, the defendant had the benefit of these matters on the trial. The testimony was admissible under the second, as well as under the first count. The only difference between the counts was, that the first averred a tender of the \$36 to Webb, the agent, and also the effort to pay it at the principal office. No prejudice has inured to the defendant by reason thereof.

We think there is no error in the judgment.

It is therefore affirmed.

TARBELL, C. J., in consequence of absence from Jackson, took no part in the consideration of this case.

NOTE. — The foregoing opinion has reference solely to policies issued under the mutual plan. By reference to the 6th section of the charter, it will be seen that "any person applying for insurance so electing, may pay a definite sum of money for such insurance, and is under no further liability."

Syllabus.

H. MUSGROVE, Auditor, etc., v. VICKSBURG & NASHVILLE R. R. Co.

50	677
72	46
50	677
81	236

1. **REPEAL OF STATUTES — EFFECT THEREOF.**—The effect of the repealing statute is to obliterate the repealed statute as completely as if it never had been passed. It must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law. If there has been a change or repeal of the law applicable to the rights of the parties, after rendition of the original judgment and pending the appeal, the case must be heard and decided in the appellate court, according to the then existing law.
2. **SAME — SAME.**—If the judgment of the court of original jurisdiction was wrong on the law as it then stood, although there may have been error, if the law has been repealed, the appellate court will not reverse and remand, because the inferior court must recognize the repeal and conform on the second trial to the law as it then was.
3. **SAME — POWER OF THE LEGISLATURE.**—The legislature has plenary power to enact laws or repeal them, unless prohibited expressly or by implication by the state or federal constitution. The power to repeal a law is as complete and full as the power to enact it. The repeal of a statute terminates all proceedings under it, unless rights have accrued which cannot be divested.
4. **VESTED RIGHTS — REMEDIES — POWER OF THE STATE OVER THEM.**—The general rule is, that the right to a particular remedy is not a vested right. The exception is of those special cases where the remedy is part of the right itself. Aside from this exception the state has complete control over remedies, provided, that in changing the remedy, it does not impair the preexisting right.
5. **SAME — ACT OF APRIL 6, 1874.**—This statute which repealed the act of 1872, allowing the auditor to assess a tax, under certain circumstances, to pay a subscription, etc., put an end to proceedings against the auditor to compel the levy of the tax, but did not destroy or impair any vested right or the obligation of any contract to which the company may have been substituted.
6. **ACT OF MARCH 15, 1873 — POWER OF AUDITOR THEREUNDER.**—This statute empowers the auditor to levy the tax when the authorities of the county neglect or refuse so to do, and such neglect or refusal is not on account of any sufficient cause or in consequence of pending and undecided litigation. It does not contemplate a legal controversy with the auditor to determine the validity of the indebtedness of the county, as no provision is made for giving notice to the county, the real party in interest; nor is any mode devised for investigating disputed issues. It



---

Opinion of the court.

---

implies that litigation must be with the boards of supervisors, for it makes a pending litigation one of the good reasons why the board declined to act. If the liability of the county has been determined by a court of competent jurisdiction, or if the board of supervisors have no valid objection to the debt, but declines to tax merely to shield the county from its burden, then the auditor may have been required to make the assessment.

7. CASE IN JUDGMENT. — The act of 1872, empowering the auditor to make the levy, having been repealed by act of 1874, pending this appeal, terminates all proceedings against the auditor. And the company having failed to show that the neglect or refusal of the board to assess the tax was willful and without good cause, a sufficient case, in the absence of the repeal of the law, is not made out to justify the auditor in making the assessment.

ERROR to the Circuit Court of Hinds County. Hon. GEO. F. BROWN, Judge.

The facts of the case sufficiently appear in the opinion of the court.

*George L. Potter*, for plaintiff in error.

*Harris & George*, for defendants in error.

Reporters find no brief on file on either side.

SIMBALL, J., delivered the opinion of the court :

By an act of the legislature of the 6th of February, 1860, the Grenada, Houston and Eastern Railroad Company were made a body corporate, with the usual franchises conferred upon such companies, to enable them to construct, equip and operate a railroad. On the 10th of the same month, a supplemental act was passed, enabling the county of Calhoun (and three other counties), "upon such terms as they may think proper," to subscribe for capital stock not to exceed \$200,000, provided such subscription shall be approved by a majority of the electors, voting at a special election, notice being given as provided in the "act" of the amount to be subscribed, and in what installments.

The second section directs the boards of police having made the subscription in accordance with the terms prescribed, "to as-

---

Opinion of the court.

---

assess and collect the amount of subscription so made, on the taxable property of the county." "The sheriff and tax collector shall issue to each tax payer a separate receipt for the amount of said railroad tax." The third section makes these tax receipts, when presented in amounts of fifty dollars, convertible into certificates of stock, which are by the 4th section transferable by delivery. The 5th section requires the sheriff to keep a separate book, in reference to this special tax, designating the names of the tax payers and the several amounts collected, which book is made evidence for the purpose, doubtless, of aiding in the object proposed in the preceding sections. The remaining sections pertain to the duties of the sheriff. See acts of 1860, pp. 412, 413-14.

The scheme of this law is two fold. First, to aid in the construction of the railroad by a county subscription, to be paid by taxation; second, to constitute the tax payers stockholders in the company, to the extent of their several contributions.

The relators aver in their petition that a special election was held on the 25th of October, 1869, at which a majority of the votes were cast in favor of a subscription of 2,000 shares at \$50 each, making in the aggregate \$100,000, to be paid in eight annual installments, commencing with the year 1870. That on the 15th of November, 1869, the board of police declared that the subscription had been approved by a majority of the votes cast, and directed their president to make the subscription. That afterwards, on the 30th of January, 1871, the president of the board made the subscription.

The relators further state that by authority of an act of the legislature, passed the 20th of March, 1871, the board of supervisors issued bonds to the G., H. & E. R. R. Co., for \$68,800, principal, bearing interest at eight per cent. until paid. Adding together the principal and interest of the several installments, to the date of the maturity of the last bond, the sum would be \$87,500, which would leave, owing on the subscription, \$8,000. The bonds begin to mature in 1873.

---

Opinion of the court.

---

The petitioners further alleged that the fifteenth section of the charter of the G., H. & E. R. R. Co., authorized it to enter into an agreement of consolidation with any other railroad company, and that in 1872 it did consolidate with the Vicksburg, Yazoo Valley and Grenada R. R. Co., and that afterwards the name of the consolidated companies was changed to that of the Vicksburg and Nashville R. R. Co. By virtue of this consolidation, and under its new corporate name, this corporation claims that it has become invested with all the rights which belonged to the Grenada, Houston and Eastern R. R. Co.

The relators allege a default in the board of supervisors, to assess the tax; to liquidate the residue of the original subscription and the matured bonds and interest thereon; and that application was then made to the auditor of public accounts, under the date of March 15, 1872, to make the assessment, who also declined. Therefore the writ of mandamus was applied for, to enforce him to make the assessment. This act of March 15, 1872, was repealed by a statute passed April 6, 1874.

This recital of the legislation, and of the acts done under it, out of which this litigation arose, was necessary in order to bring out distinctly to the view the questions of law which we propose to consider.

It will be observed that the subscription to the Grenada, Houston and Eastern R. R. Co., and the bonds executed in lieu thereof occurred before the passage of the act of 1872, under which this proceeding was instituted.

Whatever rights the Vicksburg and Nashville R. R. Co. may have to the subscription to the Grenada, Houston and Eastern R. R. Co., and the bonds in substitution therefor, come by reason of the consolidation of that company with the Vicksburg, Yazoo Valley and Grenada R. R. Co., under the new name of the Vicksburg and Nashville R. R. Co.

The first and very important inquiry is, as to the effect of the repeal of the statute of 15th of March, 1872, upon this litigation.

## Opinion of the court.

The title of the act is explanatory of its object: "to secure the collection of stock subscribed by counties, cities and towns to railroads in this state." The second section is in substance, so far as these parties are concerned, a re-enactment of the second section of the act of the 10th of February, 1860. It makes it the duty of the board of supervisors, wherever subscriptions to railroads have been heretofore made, or may thereafter be made, to impose the tax. The act of 1860 imposed that duty upon the board of police of Calhoun county, for the benefit of the Grenada, H. & E. R. R. Co. The statute of 1872 is cumulative of the prior "act," as respects these litigants, with the addition of a right conferred by the 4th section upon "any person interested in the collection of the tax to apply to the auditor of public accounts to make the assessment whenever the board of supervisors have neglected or refused to do so, without any good or lawful cause, or in consequence of any pending and undecided litigation."

The repeal of this statute in nowise affected the remedies of the relators, except that it took away from the auditor, upon neglect or refusal of the board of supervisors, power to assess the tax. The repeal left to the relators every remedy known to the law, except the extraordinary power and duty imposed on the auditor.

The later authorities, discussing the effect of a repealing statute, generally refer to the terse and precise language of Tindal, C. J., in *Key v. Goodwin*, 4 Moore & Payne, 341: "the effect of the repealing statute is to obliterate the repealed statute as completely from the records of parliament as if it never had been passed. \* \* It must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and *concluded* while it was an existing law." Sustained, as this case is, by so great a weight of authority, we accept it as an accurate statement of the general rule. Some of the very numerous American cases are: *Butler v. Palmer*, 1 Hill (N. Y.), 324; *Hardung v. People*, 22 N. Y., 95; *Duane v. United States*, 5 Cranch, 281; *C., L. & L. R. R. Co. v. Kenton County*, 12 B. Monroe, 144.

---

Opinion of the court.

---

The principle in its application (except as hereinafter mentioned) is very broad and sweeping. The authorities cited hold that if there has been a change or alteration, or repeal of the law applicable to the rights of the parties, after rendition of the original judgment, and pending the appeal, the case must be heard and decided in the appellate court, according to the then existing law. If, therefore, the judgment of the court of original jurisdiction was wrong, on the law as it then stood, although there may have been error, if the law has been repealed, the court will not reverse. Will not reverse and remand because the inferior court must recognize the repeal, and conform, on the second trial, to the law as it then was, and not to the law as it may have been at the time of the first trial. *Schooner Rachael*, 6 Cranch, 329.

An act of the territorial legislature of Ohio, of 1795, for the first time licensed administrators to sell the lands of their intestates. This statute was repealed the 1st of June, 1805. Proceedings were pending to obtain the order of sale, when the law was repealed; held that the order of sale made in August, 1805, after the repeal took effect, was *coram non judice*, and of no validity. *Bank of Hamilton v. Dudley* 2 Peters Rep., 492.

As a general truth, each legislative body has the same measure of law making power as its predecessor. Each judges for itself as to the measures and policies that will conduce to the public good. Each may undo what its predecessor has done.

The state legislature has plenary law making power over all subjects, whether pertaining to persons or things, within its limits, either to introduce new law, or repeal the old, unless prohibited expressly or by implication by the federal constitution, or limited and restrained by its own. In determining, therefore, its capacity to pass a particular law, we do not look for a grant of the special power in the constitution. But consider whether there is a prohibition in the federal constitution, or a withholding altogether, or limitation of authority over the subject, in the state constitution. Subject to these prohibitions and limitations, the right and the

---

Opinion of the court.

---

power to repeal a statute is as complete as the power to enact it in the first instance.

But limitations are imposed upon the effects of a repealing statute, by the constitution of the United States and of this state. "No state shall pass any law impairing the obligations of contracts." Clause of sec. 10, art. 1, Const. of U. S. "No \* \* \* laws impairing the obligation of contracts shall ever be passed." Sec. 9, Bill of Rights. If, therefore, the repealing statute impairs a contract which was made by the terms of the repealed statute itself, or which has been consummated under and by reason of it, the repeal can not have the effect of destroying or impairing its obligation. Cognate to this, and equally beneficent in its consequences, if rights have accrued and become vested under a law, a subsequent repeal shall not operate to destroy or divest them. Whatever has matured into, and become vested as a right of property or a right to a chose in action, as a bond or other security or credit upon the faith of a law, a subsequent repeal does not annihilate the right, especially when held by third persons.

We accept the doctrine of the law to be, that the repeal of a statute necessarily terminates all proceedings under it, unless rights have accrued which can not be divested. 6 Wend., 531; 2 B. Monroe, 402; R. R. Co. v. Kenton County, 12 B. Monroe, 144; Aspinwall v. Daviess County, 22 How. S. C. Rep., 364.

Recurring to the history of the legislation and facts chronologically, out of which the relator's claim against the county arose, it will be noted that the subscription for the 2,000 shares of stock was made under and pursuant to the act of the legislature of February 10, 1860. The question of subscription, and the terms and amount of it were submitted to the vote in 1869, nine years after this enabling act was passed. The result of the election was declared by the board of police in November of that year, and the actual subscription for the stock was made by the president of the board, two years later, in January, 1871. In July of the same year, the bonds for the subscription were issued and delivered to the Grenada, Houston and Eastern Railroad Company.

---

Opinion of the court.

---

Conceding the validity of these proceedings, it would follow that a right vested in the G., H. & E. R. R. Co. to the \$100,000 of subscription to its stock, instantly upon its being made; and, further, when the bonds were delivered in place of the subscription, a right to the bonds vested also. It may also be admitted, that the second section of the act of 10th February, 1860, empowering the board of police to pay the installments of the subscription by taxation, entered into and constituted a part of the railroad company's "right," or that it was an element in the contract between the county and the railroad company, and that it would be *ultra vires* for a subsequent legislature to repeal it. To state the proposition in other and perhaps simpler terms, the "vested right" which the company acquired was to have payment of the subscription, or the bonds, as the several installments matured, in the mode, and from the source pointed out in the second section, to wit, by taxation to be imposed by the board of police. Regarding the county and the company as parties to a contract with that condition in it, it is beyond the power of the legislature to destroy the right and impair the contract. In legal logic, when we speak of a "right," we inseparably connect it with a remedy for its invasion; when of a contract, we unite with it a remedy for its enforcement. The right which the G., H. & E. R. R. Co. had before its consolidation with the V., Y., B. & G. R. R. Co., was to demand of the board of police an assessment of the tax, and its collection by the proper officers. For the enforcement of that right, it could appeal to the proper court for relief by any appropriate remedy. The things which were *ultra vires* of the legislature would be to repeal the power of taxation granted by the second section of the act of 1860, or, by affirmative law, to cut off the company from all remedy in the courts against the board of police.

The rule is, that a right to a particular remedy is not a vested right. The exception is of those especial cases where the remedy is part of the right itself. *Cooly Con. Lim.*, 361. Aside from

---

Opinion of the court.

---

this exception, the state has complete control over remedies; provided, that in changing the remedy, it does not impair or destroy the preëxisting right. *Lesley v. Phipps*, 49 Miss., 790.

The remedies (and they were ample), which were open and accessible to the Grenada, H. & E. R. R. Co. to procure payment of the county subscription and bonds at the time its rights vested, have never been impaired or touched by subsequent legislation. They still exist, and may be availed of by the relator to vindicate his rights.

As we have seen, the act of March 13, 1872, had no larger operation than the act of 1860, except that it confided to the auditor the duty in a certain contingency to make the assessment. The repeal of that statute left the relator in possession of all the remedies which existed at the time the right to the subscription and bonds vested, and deprived him of nothing except the power entrusted to the auditor.

The case stands thus in its legal aspect. Is it competent for the legislature to repeal a statute introducing a new remedial agency affecting a particular class of liabilities, enacted subsequent to the incurring of those liabilities? The repeal leaves the party holding the liabilities all the remedies allowed by law at the time the obligations were created. There was no right contingent or otherwise within the contemplation of the parties to these obligations, that the legislature should provide an additional remedial agency; or if one was created by statute, that it should not be repealed.

Whether the legislature would leave the parties to the law as it stood when the rights under the contract vested in the original company, or whether in addition to the remedies then in force it would provide another cumulative and additional, was a matter purely of legislative discretion and wisdom. So after introducing it, it should stand or be repealed, was solely for the legislature to decide.

Cooly Con. Lim., p. 361, thus sums up the rule: "If a statute



---

Opinion of the court.

---

providing a remedy is repealed while proceedings are pending, such proceedings will be thereby determined unless provision be otherwise made."

We are of the opinion that the repeal of the statute of 1872 put an end to these proceedings against the auditor, and that the repeal did not impair or destroy any vested right or the obligation of any contract to which the relator may have been substituted.

2. But there is another view of the subject, equally fatal to the relator's pretensions. The auditor may impose the tax when the authorities of the county neglect or refuse so to do; "and such neglect or refusal is not on account of any good or lawful cause, or in consequence of pending and undecided litigation." Sec. 4, act March 15, 1872, p. 102. But if it shall appear that the refusal of the board of supervisors is not for a frivolous reason, but because of conviction, or of grave and serious doubts of the invalidity of the indebtedness entertained by the board, it refrains from action, does not make a case, intended by the statute, for the exercise of the power entrusted to the auditor.

It can hardly be supposed that the legislature meant that the auditor shall overrule the convictions, or solve the doubts and difficulties of the board of supervisors.

If that board has declined to make the assessment for the reasons suggested, a necessity has arisen, to bring the sufficiency of those reasons to a judicial test. It was hardly the legislative design that the auditor should sit in review upon them, and if he concurred, that then he should be subjected to a suit of *mandamus*.

The statute does not contemplate a legal controversy with that officer, to determine the validity of the indebtedness of the county. No provision is made for giving notice to the county, the real party in interest. No machinery is devised for investigating disputed issues. His power is invoked on the simple affidavit of neglect or refusal by the board, made by any person interested in the tax. The statute implies that litigation must be

---

Opinion of the court.

---

with the board of supervisors, and not the auditor, for it makes a "pending litigation" one of the good reasons why the board has declined to act.

If the liability of the county has been settled by a court of competent jurisdiction, or if the board has no objection to the debt, but obstinately declines to tax, merely to shield the county from its burden, then the auditor may make the assessment.

The record discloses, that the auditor caused notice to be given to the authorities of Calhoun county, of the written petition addressed to him by the relator, to make the assessment; that the board of supervisors made a written response, setting up sundry objections to the validity of the debt, some of which present legal questions of grave doubt and difficulty, and assign these as the grounds of its refusal to impose the tax. The auditor was of opinion, that these objections, taken together, was a "good and lawful cause," justifying the board of supervisors in refraining from making the assessment. And, therefore, a case was not made out for his interposition.

He brought before the circuit court these matters in response to the relator's petition.

In our opinion the law did not design that the auditor should investigate and decide solemn and difficult legal questions touching the validity of the debt. That when he became satisfied that the board of supervisors had acted in good faith, for the causes stated by it, he could well decline, and thereby remit the relator to the proper legal tribunal for the vindication of his rights.

We place our judgment on the two grounds, viz :

That the repeal of the statute of 1872 put an end to these proceedings.

Second. That independently of the repeal, and should we be in error as to its consequences, the record does not show the neglect and refusal of the board of supervisors to make the assessment, to have been upon such grounds and in such circumstances as would warrant the auditor to exert the power confided to him.

---

Statement of the case.

---

The judgment of the circuit court is reversed, and judgment here dismissing the suit.

Opinion is reserved on all other questions supposed to arise upon the record, and which have been argued by counsel.

---

R. K. BYRNE et al. v. THE STATE

1. TAXES — COLLECTION THEREOF — SHERIFFS. — The Code of 1857, p. 71, provides that sheriffs shall be ex-officio tax collectors of their counties. This provision is not embraced in the Code of 1871, though frequent mention is made of tax collectors, their duties, fees, etc., in the code. *Quære.* Is this provision of the Code of 1857 repealed by § 8 of the Code of 1871? If so, then sheriffs are tax collectors by virtue of their elections as sheriffs, for the collection of taxes was incident to and part and parcel of the duties of sheriffs when the constitution was ratified in 1869.
2. OFFICERS — ESTOPPEL. — An officer in possession of an office, exercising its functions and enjoying its emoluments, is estopped from denying his title or right to the office as justification for malfeasance or misfeasance in office. Nor can the sureties on his official bond set up such a defense when called upon to make good any default, etc.

ERROR to the Circuit Court of Prentiss County. Hon. B. B. BOONE, Judge.

This was a suit against Byrne and the sureties on his official bond, dated November 13, 1871, to recover the amount of taxes collected by him as sheriff for Prentiss county, for the fiscal year 1873. The defendants filed two pleas: 1. *Nil debit.* 2. The sureties plead that they were sureties and Byrne was principal. That Byrne was not tax collector of the county, and that the money, if any collected by him as such, was collected without authority of law. That the board of supervisors had no authority to take and accept said bond, and the same is void. That Byrne was not appointed tax collector by the supervisors nor by any one

---

Briefs.

---

having authority so to do, and the chancery clerk had no authority to receive and accept the bond, and the same is void.

The state demurred to both special pleas for cause: that they showed no defense and were double. The demurrer was sustained and leave given to defendants to plead over. There was a jury and verdict for the state.

*Green & Pickens and Geo. L. Potter*, for plaintiffs in error:

There is no provision in the Code of 1871, making the sheriff tax collector, *virtute officii*, or otherwise. It seems clear, then, aside from the adjudication of this court in the *M. & O. R. R. v. Weiner*, *supra*, that the Code of 1857, making the sheriff tax collector of his county, could not be in force, as the law making him such was one of a general nature, and had been revised and consolidated in the Code of 1871. *Shelby v. Alcorn*, 36 Miss., 273; *Blackwell on Tax Titles*, p. 98.

A voluntary bond is not binding on the obligors. A bond by a public officer, when not required by law, is not binding. *State v. Bartlett*, 30 Miss., 624.

*Robins & Allen*, for defendant in error:

The only question that seems to be presented by the record in this case is, as to whether or not the sureties on the tax collector's bond are liable for his failure to pay over the taxes collected by him, because the Code of 1871 fails to say who shall be tax collector. There can be nothing in this for several good reasons:

1st. The provision of the Code of 1857, making the sheriff tax collector, where not otherwise enacted by the legislature, is clearly still in force, while it is true the Code of 1871 is silent as to who shall be tax collector, and treats of the general subject of taxes, yet it does not in our opinion repeal the law making the sheriff tax collector, for the reason that the subject of who the collector shall be is not revised in the code of 1871, and it will certainly not be contended that the legislature intended to leave one of the most important offices in the state to so much uncertainty as their position would lead. An office involving all the revenues of the

---

Opinion of the court.

---

state is left by their construction at the mercy of those persons who have assumed to collect the taxes. To place such a construction would certainly be to show that the legislature had omitted a great duty, the omission of which would be likely to be very detrimental to the best interest of the state and to involve the states and counties in great loss.

But be the law as it may in reality, it does not lie in the mouths of those appellants to say that Byrne was not the properly and lawfully constituted tax collector of the county.

The bond recites that Byrne was *elected sheriff, and was therefore by virtue of said office, tax collector of said county of Prentiss*, and they then bind themselves for his prompt and faithful payment of all money collected by him to the state and county treasurers. We submit that there is no principle of law better settled than that sureties on the official bond of a tax collector are estopped by the recitals in the bond to deny the facts recited therein, or to deny that the principal was duly elected or designated to the office, or to deny his official character. Herman on Estoppels, pp. 171 and 172; Burnett v. Henderson, 21 Texas Rep., 588; Seiple v. Elizabeth, 8 Ducher Rep., N. J., 407; State, use, etc., v. Swigart et al., 22 Ark. Rep., 528, and the many cases cited in these authorities.

SIMRALL, J., delivered the opinion of the court.

The single point made in this case is, whether, in a suit upon the tax collector's bond, he and his sureties can successfully resist a demand made by the county for failing to pay over money collected for taxes, on the allegation that the sheriff is not tax collector, and his bond is therefore invalid.

The Code of 1857, art. 5, p. 71, made the sheriff tax collector. The words are: "The sheriff of each county shall be tax collector therein, and at the time of giving bond as sheriff, he shall give a bond as tax collector, in a penalty equal to the full amount of the taxes assessed in his county the preceding year, with twenty per cent. added thereto."

---

Opinion of the court.

---

The Code of 1871 does not, in terms, contain this article, although the duties and responsibilities of tax collector are enumerated and defined very much as in the former code.

The omission in the Code of 1871 is, that it does not declare that the sheriff shall be tax collector; and the argument is, that by virtue of the 8th section of the present code, the above recited provision of the former code has been repeated, and therefore there is no legal tax collector in this state.

The entire 22d chapter on the subject of public revenue accepts, as a fact, that there is a person charged with the duty of collecting the revenue, state and county, who is denominated collector, sometimes tax collector, thus, art. VII, § 1690: "On receipt of the assessment rolls, the *collector* shall proceed to collect and receive the taxes, and it shall be the duty of every person assessed to pay his taxes to the 'collector.'" The subsequent sections direct the modes of proceeding by distress and sale, against delinquents, etc., and the settlements with the state and county treasurers, etc.

In art 5, chapter 11, § 1372, are these words: "The boards of supervisors shall meet on the first Monday of July of each year, for the purpose of fixing the amount of county taxes, \* \* and shall order a certain rate per centum on amount of assessment roll, of state taxes, and the clerk of the board shall thereupon certify the same to the auditor of public accounts, and *sheriff of the county as directed by law*." Section 1374 makes it the duty of the person collecting the state taxes to collect also county taxes. The object of certifying to the sheriff a copy of the assessment roll, as directed by law, was to guide him in the collection as to the debtors and amounts, and upon what property imposed. Turning now to § 1685, it will be seen that after all objections to the assessment roll have been settled, the clerk of the board of supervisors shall make two copies thereof; one shall be sent to the auditor of public accounts, and the other shall be delivered to the "tax collector."

---

Opinion of the court.

---

In the former section the roll is directed to be delivered by the clerk of the board of supervisors to the "sheriff," and in the latter it shall be delivered to the "tax collector," so that he may proceed to the collection of taxes. In the former, the sheriff is assumed to be the "collector," or the person to receive the assessment roll for that purpose.

If the duty of collecting the taxes is not incident to the office of sheriff, then we have had no *de jure* collector since October, 1871, when the code went into effect. The last revision of the laws repeatedly refers to the office of tax collector. The legislature has been in session every year since that code was adopted, and has in its laws made frequent mention of that officer and his duties.

From this, one of two deductions must be drawn, either that the legislature regarded the duty of collecting taxes, as incident to the office of sheriff at the time the present constitution was ratified in 1869, and therefore when that officer was elected and qualified, as part of his official duty was that of collector of taxes, or they must have regarded the 5th article of the code of 1857 as unrepealed by the 8th section of the present code. As we have seen, the sheriff is named in one section of the code as the person to collect the county taxes at the same time he collects the state taxes.

Since the adoption of the present code, as before, the sheriffs have been collecting the public revenues. This is a recognition by the legislature and the executive department of their right so to do. In view of such recognition, and the confusion and disastrous consequences that would ensue, if an adverse opinion should now obtain, we should be constrained to hold that the sheriffs are tax collectors, because that duty was annexed by law to their office at the time the constitution was adopted, and when that office was filled, as incident to it, and part and parcel of it was the function of collector of taxes, or that the 5th article, p. 71 of the code of 1857, has not been repealed.

.

---

Opinion of the court.

---

But since we are entirely satisfied that the judgment ought to be affirmed on another ground, it is unnecessary to the exigencies of this case to announce a decisive opinion on the question we have been considering.

If we were in error in the foregoing views, it does not necessarily follow, that the bond of the plaintiff in error is void. The office of tax collector exists, with well defined duties and responsibilities in the present code.

Byrne took possession of the office, being sheriff, and, with the consent of the authorities, state and county, entered upon its functions, having given the bond in question. Can he, when he has collected the taxes imposed by law and applied the profits and emoluments to his own use, be heard to say, when called upon to pay over to the county its quota of the taxes, that he had strictly no right to the office, and the bond which he has given is invalid?

If that doctrine be sound, a *de facto* incumbent of an office cannot give a valid security for the discharge of its duties. The office was entered upon by virtue of Byrne's election as sheriff, and as incident to the person holding that place. He had a claim to the office, under which he enters and enjoys.

Applying to him and his sureties well defined principles of law, they ought to be estopped to deny that there rested upon him, both to the state and county, the full responsibilities of the office of tax collector. By means of it, Byrne has got the public moneys. The authorities have not complained that he was not rightfully in office, nor should he be permitted, as justification of failing to pay over the public funds, to plead that he did not have a good title to the office. He claimed to have collected the taxes by official authority. He executed the bond, and it was accepted and approved, on the predicate that he was rightfully in office. He should not be allowed, after enjoying its benefits, to retain the public money by a repudiation of the authority under which he made the collections.



## Syllabus.

The recital of facts in a bond is an estoppel; it is such an admission by deed, as estops the party to deny the facts recited. *Stow v. Wyse*, 7 Conn., 214. Where the bond acknowledged that the injunction was granted, the obligors could not deny the fact. *Allen v. Lockett*, 3 J. J. Marshall, 166. Nor can they deny that there was such judgment as the bond recites. 7 J. J. Marsh., 193; *Stewart v. Butler*, 2 S. & R., 381. Nor can they deny the appointment and official character of the officer named in the bond. *Borden v. Houston*, 2 Texas, 604.

There was no error, therefore, in sustaining the demurrer to the second and third pleas.

Judgment is affirmed.

---

W. H. GARLAND v. MARY GARLAND.

1. HUSBAND AND WIFE—SEPARATE MAINTENANCE.—In England a bill in equity will lie to compel separate maintenance when the wife is turned out of doors, or ill treated, or when the husband has quitted the kingdom without making any provision for the wife.
2. SAME—SAME—GENERAL RULE IN ENGLAND.—The general rule is, that a bill for maintenance without asking for a divorce could not be maintained in England, yet the chancery courts have seized upon every pretext for taking jurisdiction, with a view to her protection and support.
3. SAME—SAME—RULE IN AMERICA.—Courts of equity in America will always interpose to redress wrongs when the complainant is without full, adequate and complete remedy at law. Here there is no such process as *supplicavit*, nor a distinct proceeding for the restitution of the conjugal relations. If a wife is abandoned by her husband without means of support, a bill in equity will lie to compel the husband to support the wife without asking for a decree of divorce.
4. SAME—MAINTENANCE—VESTED RIGHT.—Maintenance is a vested right in the wife founded on the marriage contract, on the confidence reposed in the husband and on the great advantages given the husband over the property of the wife. It arises out of the marriage contract to support the wife together if they live happily; separate, if unhappy circumstances should separate them without criminality on the part of the

50	694
73	580
50	694
94	294
50	694
88	532
89	74

---

Brief for defendant.

---

wife. This is the legal duty of the husband, and the wife has a right to demand it; but as her remedy when this right is denied is inadequate at law, equity will enforce it.

5. ART. 17, CHAP. 40, CODE OF 1857. — This statute was not intended to prohibit the courts in a proper case from affording protection to the respective estates of husband and wife, or from providing a separate maintenance for the wife, other than exclusively in proceedings for divorce.

APPEAL from the Chancery Court of Pike County. Hon. E. G. PEYTON, Jr., Chancellor.

The pleadings sufficiently appear in the opinion of the court.

*Casserty & Stockdale*, for appellant, contended :

1. That the demurrer should have been sustained, as there is no jurisdiction in a court of equity to grant a separate maintenance to the wife, independent of a proceeding for divorce. *Ball v. Montgomery*, 2 Vesey, Jr., 195 ; *Duncan v. Duncan*, 19 Vesey, Jr., 396 ; 2 Story's Eq. Jur., §§ 1422, 1423, 1424, 1472. The same principle has been recognized in this state. *Kenly v. Kenly*, 2 How., 751 ; *Porter v. Porter*, 41 Miss., 116 ; 27 Miss., 630.

2. That the Code of 1871, like the Code of 1857, allows alimony only when divorce shall be decreed. § 1772.

3. That if there exist no legal grounds for divorce, then the wife who lives separate from her husband, must take the risk of a support by those means which the common law provides to charge her husband with her maintenance. A court of chancery has no remedy for her unless she can throw the burden of blame upon her husband to the extent of constituting a breach of his marriage vows.

4. That the bill fails to show such a peculiar state of facts as will justify a court of equity in granting relief on the ground that there is no adequate remedy at law for a maintenance out of the property of the husband. It fails to show a right of the wife to a maintenance by the husband, out of his property. It fails to show a neglect or refusal on the part of the husband to furnish

---

Brief for appellee.

---

his wife and child with necessaries. It shows a separate estate of the wife, and an occupation yielding some support, which is subject to her control, without any molestation by the husband. It shows a residence of both husband and wife, where they now live, and a large amount of tangible property subject to any legal demands she may have against it. And she has an ample remedy at law against him for whatever rights she may have.

*Harris & George*, for appellee, insisted :

1. That according to the principles which govern courts of chancery, the bill presents a case for relief. That the wife has an acknowledged legal right to be supported by her husband, and it is the legal duty of the husband to provide for this support, and in abandoning her without cause, and refusing to support her, he thus violates not only a legal duty, but he commits a breach of the contract of marriage, which entitles the wife to redress, not only in the form of a rescission, but in the form of enforcement by decree of specific performance to the extent of compelling maintenance.

2. That whilst the courts of law fully recognize the right of the wife to this support, and the duty of the husband to provide it, they are incapable of enforcing the contract directly, owing to the legal disability of the wife, therefore they have limited their action to the indirect method of allowing those who supply the wife to sue the husband at law. That the disability resulting from the marriage contract, alone prevents the interposition of the courts of law, for as between persons *sui juris*, a contract for maintenance would be enforced. The indirect action of the courts of law are inadequate to compel the husband to perform his duty.

3. That the right to a bill in equity to enforce maintenance, independent of special statutes, has been recognized in many states, as existing independent of the suit for divorce. In England the court of chancery declined to decree separate maintenance except where that court had dominion over property belonging to the wife, or where the ecclesiastical court had decreed

---

Opinion of the court.

---

alimony. 2 Bright, Husb. and Wife, p. 354; yet courts of equity there on the slightest jurisdictional pretext would decree separate maintenance. Peachy on Mar., pp. 158, 173. That the scope and extent of the wife's equity to separate maintenance rests on the acknowledged right of the wife to maintenance independent of the consideration of any property right in her. The exclusive authority of the ecclesiastical courts over the subject of marital relations and the peculiar status of the wife at common law, restrained the courts of equity in England. 2 Story Eq. Jur., § 1423, n. (a.); Bishop on Husb. and Wife, 553; 7 B. Monroe, 49; 3 Dava, 38; 4 Littell, 201; Purcell v. Purcell, 4 Hen. & Munf., 507; Glover v. Glover, 16 Ala., 440; Galland v. Galland, 38 Cal., 265.

TARBELL, J., delivered the opinion of the court.

The complaint of Mary Garland represents that she was married to William H. Garland in 1855; that they lived together as husband and wife until 1867; that in the latter year they signed written articles of separation; that such separation was to be final, except by the consent of both parties; that toward the close of the year last named, the parties, by mutual consent, resumed their relation as husband and wife, and lived and cohabited together as such, until 1871; that the contract of separation was signed by the complainant because of the threats, persecution and insufferable conduct of William H. Garland, and not because of her desire to abandon her conjugal relations with her husband; that all of the property she owns is a house and some lots of land in the town of Summit, in Pike county, and some lands, of no value for the means of support except by a sale; the house, she uses for a residence for herself and two daughters; that she has no means of support for herself and family, except occasionally she has a few day or month boarders; that without the relief prayed for in her bill of complaint, her property will have to be sold for taxes; that William H. Garland is the owner of the lands described and set forth in the bill; that of the value of the property and amount of rents of

---

Opinion of the court.

---

the same annually received, complainant is not informed, and prays a discovery; that William H. Garland recently caused to be published in the newspaper printed in the place of the residence of the parties hereto, a notice to all persons not to give credit to any one on his account; that this notice was intended, and has the effect of preventing complainant from getting even the means of subsistence on his account and credit; that in January, 1871, her husband, William H. Garland, ceased to live and cohabit with her as his wife; that he has since repeatedly insisted that the complainant should sue for a divorce from him because of his desertion of her, and that if she did not institute proceedings for that purpose, he would; that she has been guilty of no act which would justify a divorce; that she does not desire to be released from the bonds of matrimony; that she has on many occasions entreated her husband to live with her again as his wife; that he has many times promised by parol and by letter that they would again be reunited as husband and wife; that the separation was entirely against her will; and although she signed and acknowledged the articles to that effect, she still hoped her husband would change his mind and again live publicly with her as his wife; that complainant has allowed no fit and proper opportunity to pass without calling her husband's attention to his promises to live with her again as his wife, and he as often assured her that the time would soon come when they would resume their matrimonial relations; that at the time of the separation on paper, she had no idea that the same was intended as a means to effect a legal separation from the bonds of matrimony; she hoped that in a short time after the execution of the contract of separation, a reconciliation and reunion would take place; that complainant knows of no sufficient reason why the same should not occur, as it was and is her earnest wish; that at all times since their separation she has been willing to resume her marital obligations to her husband and live and cohabit with him again as wife, and render to him all the duties of wife, of all which her husband has full knowledge,

---

Opinion of the court.

---

and that she was ready, and willing and anxious that they should live together as husband and wife; complainant avers that although she has by her husband been abandoned, uncared for and threatened with vexatious litigation, she is now willing to resume her duties as wife and do whatever she can for the future happiness of "her husband, and to relieve herself from that widowhood not brought on by any cause or fault of hers," and charges that the contract of separation was never of binding force, or if it was, that it has been annulled by mutual consent, according to its terms; wherefore the bill prays that William H. Garland be made defendant; for discovery of his property; for an allowance pending this litigation; for injunction; that the agreement of separation be annulled; that an account be taken to ascertain and fix a proper amount for the yearly support of complainant; and for an order and decree that the same be paid annually; and that such amount be fixed, ascertained and decreed to be a lien on the property of the defendant; for general relief, etc.

The foregoing presents, somewhat fully, the allegations of the original and an amended bill. The case was heard before the chancellor on demurrer. To the original bill, the following causes of demurrer were assigned:

1. No equity on the face of the bill.
2. The bill presents no case within the jurisdiction of the court as justifies the relief prayed for.
3. The complainant avers no discharge or willingness to discharge her conjugal duties to her husband as entitles her to the rights of a wife.
4. She shows no reason in law to justify her living separate from her husband, other than a voluntary separation, which does not entitle her to a separate maintenance.
5. The bill does not show any failure of defendant to discharge any duty as husband.
6. The bill shows no such *prima facie* case as entitles complainant to an allowance for attorney's fees, or other allowance, pend-

---

Opinion of the court.

---

ing the litigation, if she was without separate property, but the bill shows she owns separate property adequate for such purposes.

This demurrer was sustained, with leave to complainant to amend her bill. This was done, and to the amended bill the following causes of demurrer were filed :

1. No equity on its face.
2. It presents no such case within the jurisdiction of the court as justifies the relief prayed for.
3. It does not show or charge any default on the part of the defendant to maintain complainant, or that she has failed to procure what is necessary from him, or that she ever disclosed to him any necessity for his aid, or that he ever refused any demand made on him for maintenance.

4. Nor does it show a right to allowance for attorney's fees.

This demurrer was overruled, and the defendant appealed, assigning for error the decree overruling the demurrer to the amended bill.

From the foregoing synopsis of the pleadings, it will be seen that the case presented for adjudication is that of a wife without fault and without the means of support, deserted or abandoned by her husband, who, fully aware of her situation, not only does not supply her wants, but gives notice to the public not to trust any one on his account, except on his order, or the order of his agent.

Under these circumstances the bill seeks to compel the husband to provide, out of his property, a suitable support for the wife, without asking for a divorce.

The sum of the argument in answer to the complaint is, that the chancery court has not jurisdiction to award separate maintenance, except when the proceeding has for its object some other specific, substantive relief, as for divorce, to which an allowance is an incident. Apparently, this is the doctrine of the authorities, and, if understood, this is the view entertained by Mr. Bishop in his treatise on marriage and divorce, though he admits that the

---

Opinion of the court.

---

contrary rule has obtained a footing in American jurisprudence. As the question is, with us, one of first impression, a somewhat careful consideration of the subject will be undertaken.

In support of the argument of the demurrant, reference is made to *Ball v. Montgomery*, 2 Ves., p. 195; *Duncan v. Duncan*, 19 id., 396; 2 Story's Eq. Jur., §§ 1422, 1423, 1424, 1426, 1472; *Kenly v. Kenly*, 2 How., 751; *Porter v. Porter*, 41 Miss., 116; *Lawson v. Shotwell*, 27 id., 630; 2 Kent's Com., 147; Code of 1857, art. 13, p. 334.

The contest in *Ball v. Montgomery* was with reference to dividends on stock, which was the subject of a marriage settlement. The wife eloped soon after the marriage, whereupon the husband instituted proceedings to obtain those dividends and interest, and to have the fund secured. The wife, at the time of the suit, was living in adultery. According to the report of the case, the questions therein were: "First. Whether the plaintiff was entitled to these dividends during the joint lives of himself and his wife, or whether she could claim them as a resulting trust to her separate use. Secondly. If the plaintiff was entitled, whether he could take the dividends without making a provision out of them for the wife. A third question was made at the bar, though not prayed by the bill, whether, if the plaintiff could not succeed, the dividends should not be brought into court."

During the argument of the case, in response to counsel, Lord Chancellor Loughborough said "that no court, not even the ecclesiastical court, has any original jurisdiction to give a wife a separate maintenance. It is always as incidental to some other matter, that she becomes entitled to a separate provision. If she applies in this court upon a *supplicavit* for security of the peace against her husband, and it is necessary that she should live apart, as incidental to that, the chancellor will allow her separate maintenance."

On the other hand, the distinguished counsel for the plaintiff, Sir John Scott, then attorney general, and Sir John Mitford, then



---

Opinion of the court.

---

solicitor general, stated that "the ground for the separate provision of the wife must be, that, notwithstanding the material right of the husband, her situation is such that, being separate from him, she ought, in equity, to have a separate provision."

It will be observed that the chancellor recognizes the fact that, under circumstances, it may be necessary for the wife to live apart from her husband, in which case she would be entitled to an allowance, and that the eminent counsel for the plaintiff in that case stated that the situation of the wife might be such that, being separate from the husband, she ought, in equity, to have a separate provision. In what state of circumstances or situation can the wife be placed, appealing more strongly to a court of equity, than the desertion by the husband without cause, and his refusal to maintain her or permit others to supply her wants on his credit?

Duncan v. Duncan, 19 Ves., Jr., 395, was an application by the wife for separate support. The bill alleged cruel treatment by the husband, and consequent separation. The answer denied this allegation, and no proof was taken on either side. The master of the rolls, Sir William Grant, who was of counsel for the defendant in Ball v. Montgomery, *supra*, says: "I do not find an instance that, upon such a state of facts, a separate maintenance has been provided by the court, either out of the husband's property or that which was originally the property of the wife. The cases in which subsistence has been provided by the court, are either where the husband has turned her out of doors, or by ill treatment obliged her to leave his house, or had quitted the kingdom leaving her destitute. Cases of the first sort are: Oxenden v. Oxenden, 2 Vern., 493; Nicholls v. Danvers, *id.*, 671, and Williams v. Callow, *id.*, 752, questioned by Lord Rosslyn in Ball v. Montgomery, 2 Ves. Jr., 191, but sanctioned by Danvers v. Danvers, in the House of Lords, although Lord Rosslyn [Loughborough] says, "it is contrary to the established doctrine, that a married woman should be a plaintiff in a suit in this court for separate maintenance." Then follow, at length, the remarks of the

---

Opinion of the court.

---

chancellor in *Ball v. Montgomery*, quoted above. The master of the rolls, in *Duncan v. Duncan*, then concludes as follows: "Cases of the other description are *Colmer v. Colmer*, *Mosely*, 121; *Coop.*, 254; *Watkyns v. Watkyns*, 2 *Atk.*, 96; *Sleech v. Thorington*, 2 *Ves.*, 560, and *Wright v. Morley*, 11 *id.*, 12, in each of which the husband had left the kingdom without making any provision for his wife, but I can find neither principle nor authority for what is asked in such a case as this, going no further than the fact that they live asunder."

It is an interesting fact, and not immaterial to this discussion, to state here, that in *Ball v. Montgomery*, the chancellor said of the cases referred to by the counsel: "I did not recollect that there were such cases as are cited from *Vernon*." The same counsel, afterwards as master of the rolls, cited the same cases in support of the same views. These cases have been consulted and found correctly cited. If a bill will lie by the wife, "when turned out of doors" by the husband, or "when by ill treatment she is obliged to leave the house," as in some of the cases, *supra*, why not when she is abandoned and refused support by him, and when, in addition thereto, he interferes to prevent her use of his credit; and if, "when he has quitted the kingdom" or country, why not, when he has deserted her and prevented supplies on his credit, although he remains in the same state, county and town? It is impossible to conceive, that "if the former cases afford just ground of equity jurisdiction, that the latter does not."

*Kenley v. Kenley*, 2 *How.*, 751, was this: There was an antenuptial contract by the husband wherein he promised not to interfere with or claim the separate property of the wife. Soon after marriage she left him and filed a bill in which she charged cruel treatment, and prayed for a perpetual injunction against her husband intermeddling with her separate estate, and that the same be placed in the hands of a trustee for her use. The evidence disclosed no other or more cruel treatment than occasional sallies of passion and petulance of manners. It was not pretended that

---

Opinion of the court.

---

he ever offered her violence or threatened it, or at any time she felt apprehensive for her personal safety. The husband repeatedly invited his wife to return, and promised her the most kind and affectionate treatment; and the only reason assigned for her refusal to comply with his solicitations was, "that her uncle Congar said it would injure their cause." In view of these facts, the court say: "It was a just conclusion, from the law and facts here stated, that had there been a separate maintenance decreed in favor of the appellee in this case, upon just grounds of cruel treatment, it would be discontinued upon the evidence here adduced, for the reason, that in such cases courts of equity will afford the wife no aid whatever to continue her separation from her husband, as it is deemed subversive of the true policy of matrimonial law and destructive of the best interests of society."

With reference to this authority, it need only be remarked, that in the case at bar the facts are, in important respects, reversed, the husband having deserted the wife and declines her appeals for reunion.

In *Lawson v. Shotwell*, 27 Miss, 630, the appellant, while she was Mary E. H. Shotwell, filed her bill against her then husband for a divorce, which was granted. No decree was asked or made for alimony. Subsequently, the wife filed supplemental and amended bills, seeking an allowance for support out of the husband's property, and to obtain restitution of property which she brought into the marriage. There was a demurrer to these bills, which was sustained, and the bills dismissed. This action of the court below was sustained on error. Referring to the claim for alimony, the court say: "We do not intend to intimate that there may not be cases in which an original bill, after a decree for a divorce, could not be maintained for alimony; but only that the present bill shows no sufficient reason for not taking, or at least, asking, such a decree from the circuit court, touching the matters now in litigation. A good reason must be alleged why the alimony was not at the proper time allowed." And then, as to the

---

Opinion of the court.

---

restitution of the wife's property, it is said, "this was a matter for the circuit court to adjudicate, and no good reason having been shown why it was not acted on, the bill cannot, in this respect either, be sustained." In the course of the opinion, several questions are incidentally mentioned, among others, the rule stated by the chancellor, in *Ball v. Montgomery*, *supra*, is repeated; but it does not appear to have been involved in the case.

*Porter v. Porter*, 41 Miss., 116, was an application for alimony, *pendente lite*, and a writ of error to review the action of the chancery court on this branch of the case. The suit was instituted for divorce. The opinion of the court contains nothing bearing on the case at bar. It was simply held, that if the bill contain sufficient matter, if true, to entitle the wife to a divorce, an allowance was a matter of course.

By art. 13 of the Code of 1857, p. 384, divorces are authorized in certain cases, and the court, in granting such divorces, may decree "protection to the parties in regard to their property." Section 17 empowers the court, in such cases, to "make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife." An argument is not supposed to be necessary to show that this statute no more intended to forbid the courts, in a proper case, from affording protection to the respective estates of husband and wife, or from providing a maintenance for the latter, other than exclusively in proceedings for divorce, any more than it was designed thereby to deprive the courts of their power, when properly invoked, to provide for the care, custody and maintenance of children in other cases than those of divorce.

There are numerous adjudications on this point, all holding the statute, in the respect indicated, to be cumulative.

2 Story's Eq. Jur., §§ 1422, 1423, 1424, have reference to the English cases already mentioned. In § 1422 this author says: "A woman may be totally abandoned and deserted by her husband; or she may be driven from his home, and compelled by

---

Opinion of the court.

---

his ill-treatment and cruelty to seek an asylum elsewhere. The question, therefore, may arise, whether, under such circumstances, courts of equity have a general authority to decree alimony to the wife when she is left without any other adequate means of maintenance. To this question, propounded in its general form, it can scarcely be said that, according to the result of the authorities, an answer in the affirmative can be given in positive terms."

Referring to these same English cases, the chancellor, in *Purcell v. Purcell*, 4 How. & Mun., 511, alludes to the clashing of the English judges upon the question under consideration, and observes "that if the jurisdiction of the court were now to be settled upon English precedents, there might be some doubt about the question, from the cases, as brought into one view by Mr. Vanblanque." It is sufficient for the present discussion that, according to the English precedents, the question at bar is left in "doubt." Before proceeding to a consideration of the American adjudications, however, on this subject, a further mention of the practice in this class of cases in England, may seem to present more vividly the "clashing of the English judges," and "the doubt" as to the rule there. If in England a wife's claim to a separate maintenance is not, *per se*, a question proper for discussion in a court of equity, yet the case may be so mixed up with circumstances as to render the interposition of the court of chancery expedient and even necessary.

A few of these circumstances may be named: When the husband has left the kingdom without making any provision for the wife. *Duncan v. Duncan*, 19 Ves. Jr., 394, and authorities therein cited.

If the husband, after assigning part of his wife's equitable interest in stock, abandons her, without making any provision for her support, chancery will order the dividends accruing upon the remainder of the stock to be paid to her. *Wright v. Morley*, 11 Ves. Jr., 12. *Watkins v. Watkyns*, 2 Atk., 98.

When the wife has been used with cruelty, which would justify

---

Opinion of the court.

---

her proceeding by *supplicavit* against her husband, the court may decree her maintenance out of any funds within its reach, belonging either to the husband absolutely, or in right of his wife. *Nicholls v. Danvers*, 2 Vern., 671; *Duncan v. Duncan*, Coop., 25d.

In an application by the wife merely to be placed in the same situation in which she would have been if a legal instrument, creating an actual trust in her favor, had not been wrongfully destroyed, the court took jurisdiction and awarded relief, although she was living in adultery. *Seagrave v. Seagrave*, 13 Ves., Jr., 413; *Sidney v. Sidney*, 3 P. Wms., 276.

Although the propriety of so doing has been constantly doubted, yet the chancery courts of England take jurisdiction of cases to enforce specific performance of written articles of separation, and a separate maintenance to the wife. *Fletcher v. Fletcher*, 2 Cox, 99; 3 Bro. C. C., 619.

As a rule, when the husband appeals to the court against the wife to obtain possession of her separate estate, he will be compelled to make provision for her, or the property will be taken in charge by the court, even though the wife had eloped and lived in adultery. *Ball v. Montgomery*, *supra*.

The chancery courts of England will also take jurisdiction of a proceeding by the wife against her husband for a restitution of conjugal rights or relations; a decree for such resumption will be enforced by dealing with the husband as for contempt, or for separate maintenance to the wife.

According to Vanblanque, vol. 1, p. 94, "a wife may have a separate estate from her husband, as by agreement, or by decree for ill usage, or alimony."

And while the courts of England refuse to decree separation in a proceeding to enforce specific performance of articles for that purpose, and for separate maintenance, they will, in such case, take jurisdiction expressly to decree support; though this is regarded as a "singularity." 2 Bright's H. & W., 327.

By reference to the cases cited in 1 Vanb., 104, 105, it will be

---

Opinion of the court.

---

seen that there have been adjudged cases in England where the court of chancery has decreed alimony to the wife. Some of these are cases of agreement; others where proceedings were had against the husband in the ecclesiastical courts, *propter sævitiam*; while there are cases of decrees in equity in favor of the wife, without any of those "circumstances" referred to, merely on the ground of ill usage, or desertion of the wife by the husband, when there was no divorce, and no agreement to separate. 1 Vanb., 104-5; 1 Ch. R., 24; 2 Vern., 752; 2 Atk., 96.

Hence, as Lord Loughborough acknowledged, his memory was at fault, when he said there were no cases to compel a husband to provide a separate maintenance for his wife, except as incidental to some other proceeding. But even if he was right, can a reason be framed why, if a separate maintenance will be awarded when the wife is turned out of doors by the husband, it will not be decreed in case he abandons her, persistently declines restitution of the marital relations, and by notice, prevents the use of his credit for her support?

For the purposes of this discussion, it is sufficient either that the practice has not been uniform, or that the rule is in "doubt" in England. An inspection of the English cases shows the rulings there conflicting and inconsistent. This is clearly shown in 2 Dess.; 4 id.; 4 Hen. & Mun., 507; 38 Cal., 265; 1 Bright's H. & W., 255, and other cases herein.

Certainly, in several cases, alimony was decreed where there appears no sentence of separation or agreement, and in some of these it appears there was neither a divorce nor an agreement to live separate. *Nicholls v. Danvers*, 2 Vern., 761; *Oxenden v. Oxenden*, id., 493; *Williams v. Callow*, id., 752; *Lashbrook v. Tyler*, 1 Ch. Rep., 24; *Watkins v. Watkins*, 2 Atk., 97; 1 Bright, H. & W., 255.

And not only did Lord Loughborough overlook or forget the above cases, when presiding as chancellor, in *Ball v. Montgomery*, but in the later case of *Bullock v. Menzies*, 4 Ves., Jr., 79S,

---

Opinion of the court.

---

wherein he also presided, he recognizes desertion as a ground of equitable interference in behalf of the wife, contrary to the rule previously declared by him.

In the still later case of *Wright v. Morley*, 11 Ves., Jr., 12, Sir William Grant, master of the rolls, says: "As to the bill of the wife upon the grounds I have stated, I cannot give her the whole of the dividends. But upon several cases, *Watkins v. Watkins*, 2 Atk., 96; *Bond v. Simmons*, 3 id., 20; *Colmer v. Colmer*, Mosely, 119; *Sleech v. Thorington*, 2 Ves., Sr., 560; and the late case before Lord Rosslyn (Loughborough), *Bullock v. Menzies*, 4 Ves., Jr., 798, there is no difficulty in giving her the remainder for her separate use during the absence of her husband."

At all events, the English chancery courts not only have not abstained from interference in favor of the wife, but they have absolutely and affirmatively seized upon every excuse, even the slightest pretext, for taking jurisdiction, with a view to her protection and her support. There would seem to be no possible circumstances in which courts of equity in England, have not taken jurisdiction for the protection and maintenance of the wife, except in the single instance of desertion, simply disconnected from all other facts and circumstances of equitable interference, thus doing indirectly, or in a roundabout way, what they declined to do directly, and upon grounds evidently peculiar to the English system of government.

Sir William Grant, both as counsel and as master of the rolls, favored jurisdiction in such a case, and took a wider, broader and better view than the chancellors and judges. Why this jurisdiction was refused, can only be conjectured to have resulted from the common law theory of the superiority of the husband and the subordination of the wife. The argument was with Sir William Grant. Reason, philosophy and the conscience, which are the basis of equity, certainly favor it. No solid objection has been or can be made to it. A careful examination of the authorities leads to the reflection that English equity, as between hus-



---

Opinion of the court.

---

band and wife, has been partial to the former, and has denied to the latter a just, reasonable and clear equity.

"The suit for alimony is given to the wife in case of separation, if the husband refuses to make her an allowance suitable to their station in life and his fortune." 8 Bl. Com., 93, 4.

"Alimony is a vested right, on a proper case being made out. It arises out of the marriage contract to maintain the wife, together, if they live happily; separate, if unhappy circumstances should separate them without criminality on the part of the wife. It is an allowance out of the husband's estate for the wife's support, on consideration of all the circumstances." 1 Bl. Com., 441, 2.

"Maintenance is a vested right in the wife, founded on the marriage contract; on the weakness of the sex; on the confidence implicitly reposed in the husband; on the great advantages given to the husband in and over the property of the wife. It is a duty to allow it." 2 Bl. Com. 302; Godolphin, 509; 1 Leving, 6.

These quotations from the great commentator seem to prove that theory and practice of the laws of England are not in harmony.

Turning to the U. S. it is found that the courts have disagreed on this subject. Several of the states have, by legislation, conferred on their chancery courts this jurisdiction, which, in some, has been denied by their courts. The question is substantially one of first impression in our own state. In the following cases, the jurisdiction invoked herein is affirmatively asserted as one eminently equitable, and in some of them the English decisions are reviewed and criticised as irreconcilably antagonistic. *Purcell v. Purcell*, 4 Hen. & Mun., 507; *Prather v. Prather*, 4 Dess., 33; *Mayhugh v. Mayhugh*, 7 B. Mon., 424; *Butler v. Butler*, 4 Littel, 202; *Lockridge v. Lockridge*, 3 Dana, 28; *Glover v. Glover*, 16 Ala., 440; *Jelineau v. Jelineau*, 2 Dess., 45; *Anonymous*, ib., 198; *Denton v. Denton*, 1 John. Ch., 364; ib., 441; *Miller v. Miller*, 1 Saxton, 386; *Galland v. Galland*, 38 Cal., 265; *Wallingsford v. Wallingsford*, 6 Har. & J., 485; *Helms v. Franciscus*, 2 Bland. Ch., 568.

Mr. Story, in his Eq. Jur., § 1423, a, says: "In America, a

---

Opinion of the court.

---

broader jurisdiction in cases of alimony has been asserted in some of our courts of equity; and it has been held that if a husband abandons his wife and separates himself from her without any reasonable support, a court of equity may, in all cases, decree her a suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case. And there is so much good sense and reason in this doctrine, that it might be wished it were generally adopted." No sufficient reason can be offered in answer to the broad proposition of Mr. Story, and the objector must rely upon the technical fact that it has not obtained in England. *Purcell v. Purcell*, 4 Hen. & Mun., 507, presented three questions, marriage, desertion, and the right of the wife to a separate maintenance. The two first averments were established. As to the third, the chancellor said: "I hold, that in every well regulated government there must somewhere exist a power of affording a remedy when the law affords none; and this peculiarly belongs to a court of equity; and as husband and wife are considered as one person in law, it is evident that in this case the law can afford no remedy, which is universally admitted to be a sufficient ground to give this court jurisdiction, and therefore it must entertain the bill, if there be sufficient proof of the marriage." In the opening of his opinion, the chancellor said: "I shall leave the clashing of the English judges to be reconciled among themselves, and take up the question upon first principles." The marriage was sustained and the prayer for a separate maintenance granted. The decree required an annual payment by the husband to the wife "until he should restore her to the comforts of her bed and board, and give satisfactory assurances for her enjoyment thereof." This decree was enforced by committing the husband to prison for neglecting compliance. He purged himself of the contempt by paying to his wife the amount due and in arrear, and giving security for his future performance of the decree.

Precisely the same question under consideration was before the

---

Opinion of the court.

---

courts of South Carolina in the case of *Prather v. Prather*, 4 Des., 33. The opinion is a searching review of the English decisions, and a very emphatic assertion of the equity of the rule which Story says, "it might be wished it were generally adopted." The court in that case observe: "It might be sufficient to say, that as there have been cases on both sides of the question, \* \* \* I should feel myself at liberty to select those cases for my guide which applied to the circumstances of this country, and would best promote the purposes of justice. \* \* \* The subject has been discussed, and the court has decreed that the wife should have a separate estate from her husband, in the case of ill usage, and a consequent separation or desertion by the husband, though no agreement for a separate maintenance and no divorce. \* \* \* I allude to several cases which were decided in this court some years since, expressly on the ground that no other tribunal could give redress, and that it would be unseemly and highly mischievous if this court did not interfere." See also 2 Des., 198, and cases in South Carolina therein referred to.

In *Jelineau v. Jelineau*, 2 Des., 45, the argument against separate maintenance, as here, was, that the court had no power to grant it except as incidental to some other matter; but the court say that the English cases cited adverse to the jurisdiction, "are by no means applicable to our local situation. \* \* \* If there were no precedents of the interference of the court of equity in cases of this sort, we must make them, rather than so wanton an abuse of power by a husband over his wife, should escape with impunity."

Referring to the cases holding that alimony can be allowed only as an incident to some other special matter, the court, in *Butler v. Butler*, 4 Littell, 202, say: "But suppose the case of abandonment by a husband, and that the separation is complete without any sentence, and that the wife is left to the humanity of the world, without support, has the chancellor, without the statute, or in cases not embraced by it, no authority to direct a por-

---

Opinion of the court.

---

tion of the husband's estate to be set apart for the support of the wife, leaving the marriage contract as obligatory as ever?" The answer to this question is a vindication of the jurisdiction.

The supreme court of Alabama, in *Glover v. Glover*, *supra*, use this language: "No one will deny but that the husband is bound by the strongest obligations, resulting not alone from the contract of marriage, but founded upon the highest moral consideration, to support his wife. And if it be true that the law, as well as enlightened conscience, creates this obligation, and no court can enforce its performance or compensate for its most cruel and flagitious violation, then indeed has one class of cases been found, which falsifies the boasted maxim, 'that for every wrong there is a remedy, and for every injustice, an adequate and salutary relief.'" And after adverting to the disagreements of the English chancellor, the court also say: "So stands the law in England, and since her learned chancellors have not been able to reconcile their own decisions, we feel that we shall not be wanting in respect for them in adopting a rule of decision for ourselves, which we conceive to be more consonant with an enlightened equity, and with the fundamental principles and maxims upon which the jurisdiction of our courts of chancery is based." Upon a full consideration of this question and of the authorities, in *Galland v. Galland*, 38 Cal., 265, the able opinion in that case concludes that the reasoning of the cases in support of the jurisdiction "appear to admit of no satisfactory answer." However the American cases may be arranged in point of numbers, the argument is believed to be unanswerably with those assuming the jurisdiction under discussion. The adjudications above referred to were by courts, judges, and chancellors of exalted character, whose opinions command the highest respect in all courts, and they embrace states whose judiciary has ever ranged among the foremost in the count.

The answer made by the authorities to the position that separate maintenance is incidental to some other proceeding or right,

---

Opinion of the court.

---

may, perhaps, be briefly and advantageously stated, thus: Here is a virtual divorce from bed and board by the act of the husband against the wishes of the wife. In the absence of ecclesiastical courts, and of the right to a suit for the restoration of marital rights, such a case must draw after it the doctrine and relief required by the circumstances, by our changed judicial system, by the condition of the country, and the wants of our society, else the greatest injustice might be done without any remedy. For, if the courts will not aid a wife who voluntarily separates from her husband, neither will they refuse redress when the husband abandons the wife and refuses to maintain her, because, in both cases, the purpose of the parties is "subversive of the true policy of the matrimonial law, and destructive of the best interests of society."

Hence, there is opened a way in this country for the practical realization of the evident desires of the English chancellors for the protection of the marital rights of the wife, who often found her cause dependent upon a jurisdiction assumed on a mere "pretext," or other doubtful ground. In *Butler v. Butler*, *supra*, Judge Mills said, "it is clear that a strong moral obligation must lie on every husband, who has abandoned his wife, to support her. The marriage contract and every principle bind him to do this. To fail to do it, is a wrong acknowledged at common law, though the law knows no remedy, because there the wife cannot sue the husband. But in equity, the wife can sue the husband, and it is the province of a court of equity to afford remedy where the conscience and the law acknowledge a right, but know no remedy. Why, then, should the chancellor shrink at this case and refuse a remedy? It is evident that this arose in England for fear of intruding upon the ground occupied by the ecclesiastical courts."

And in this quotation, the whole case at bar is embraced. With us, marriage rests in contract, and the obligation is both to the wife and to society. That the remedy at law, in case of a breach of this contract, is neither full, adequate nor complete, is plain to ordinary experience. The law's delays are proverbial. The

---

Opinion of the court.

---

credit of a man, stubbornly determined not to support his wife, will not feed the hungry nor clothe the naked. A man might be worth a large fortune, yet so situated as to defy judgment and execution. The credit of one so disposed would avail nothing in the market in the way of procuring supplies, as merchants will not part with their goods upon such uncertain security. With reference to the ecclesiastical courts of Great Britain, it may be remarked that, in the settlement of this country, they were not engrafted upon our institutions. Neither did our forefathers transfer to this country the proceeding by *supplicavit*, as known in the chancery practice of England. In the jurisprudence of that country there is, also, what is unknown here, a distinct proceeding for the restitution of conjugal relations provided, as is said, "as a sort of substitute for justice." In the place of all these there is pointed out the more salutary, just and equitable remedy sought in the case at bar.

The observation of Mr. Story (Eq. Jur., vol. 2, § 1427), that the courts will afford the wife no aid in accomplishing a purpose "subversive of the true policy of the matrimonial law and destructive of the best interests of society," is applied by the author to a case wholly different from the one made by this record, viz., the "voluntary separation of the wife from the husband; or, if he is *bona fide* ready and willing and able to maintain her, and she, without good cause, chooses to remain separate from him."

This leads to the solution and conclusion of the question under consideration, which, as presented by the bill, is that of a wife, without fault on her part, wilfully abandoned by the husband to whose support and protection she is anxious to return, but her requests for reunion are persistently refused by him. Process for the restoration of marital rights being unknown to our jurisprudence, another and better remedy is in the power of chancery to compel the husband to support the wife until he shall restore her to his bed and board. Support of the wife is the legal duty of the husband. The wife has a right to demand it, but, as her remedy,

---

Opinion of the court.

---

when this right is denied, is not full, adequate and complete at law, equity ought to enforce it. In abandoning the wife without good cause, and refusing to support her, the husband violates a legal duty and commits a breach of contract, which entitles the wife to redress, either by divorce, or to the enforcement of the marriage contract by compelling restitution of conjugal rights to the extent of maintenance, at her option. If she chooses the latter she ought not to be starved into the former, for that would force her to abandon the marriage contract against her will.

With reference to the articles of separation between the parties to the case at bar, see 1 Saxton, 386; Guth v. Guth, 3 Bro. Ch., 504, and notes; 4 Paige, 516; 2 Ves. Jr., 198, 199; Schouler, 294; 1 Bish. M. & D., § 634; id., 806; 2 Story's Eq. Jur., § 1427; id., 1428; 1 Bish., M. & D. ch. 32; id., ch. 38; 2 id., ch. 19; Schouler, ch., 17; Tourney v. Sinclair, 3 How., 324; Carter v. Carter, 14 S. & M., 59; Stephenson v. Osborne, 41 Miss., 119; Weathersby v. Weathersby, 40 ib., 462. But the agreement, by its own terms, is annulled by the subsequent voluntary cohabitation of the parties.

See further, 4 How., 109; 15 Ala., 141; 6 Pick., 89; 1 Ohio St., 403; 16 Ill., 278; 4 Iowa, 321; 27 Ct., 14; 2 Bright, H. & W., 69; 2 Johns., ch. 206; 5 id., 464; 6 id., 25; id., 178; 3 Cow., 590; cases cited in Bouvier's Law Dic., Alimony; and a late case, Iowa, as reported in the American Review, for April, 1875.

And thus it is, that in the progress of society, the fictions, technicalities and pretexts of the past, give way, one by one, as hindrances and embarrassments to the due administration of justice.

Decree affirmed and cause remanded, with leave to answer in forty days from this date.

---

Statement of the case.

---

## WM. B. PARTEE et ux. v. JAMES STEWART.

60 717  
72 191

1. **HOMESTEAD EXEMPTION — HOW ACQUIRED — HOW LOST.** — The debtor holds the homestead exempt upon the condition of occupancy as a residence; if abandoned, it is immediately subject to seizure and sale by a judgment creditor. When several separate tracts of land are owned by a debtor, the privilege of making a selection of the homestead does not exist. The law confines it to the parcel upon which the family reside and have their domicil.
2. **HUSBAND AND WIFE — AGENCY.** — The husband is not the general agent of the wife and cannot by his acts defeat the wife's interest in real estate, unless thereto authorized or sanctioned by her. Code of 1857, p. 814.
3. **HOMESTEAD EXEMPTION — CASE IN JUDGMENT.** — The law gives a homestead to every owner of the land, being a householder and head of a family. A married woman, the owner of separate property, and residing upon it as a domicil, with her family, is entitled to claim her homestead exemption. The husband is the head of a family, in the sense that wife and children are subject to his marital and paternal control. But he has no authority and control over the wife's property or the application of it to the support and nurture of the family, unless by her consent. If the land occupied is the domicil of the family, it is her residence with supreme control, except that she cannot mortgage it on a lien without his approbation.

**APPEAL** from the Chancery Court of Yazoo County. Hon. J. J. HOOKER, Chancellor.

The bill of appellee was filed in the chancery court of Yazoo county to enjoin appellants from setting up as a defense or plea a homestead exemption, to an action of ejectment brought against them by appellee, in the circuit court of Yazoo county. The bill alleges that Stewart, the appellee, recovered a judgment against William B. and Sarah D. Partee, in the circuit court of Yazoo county, upon which execution issued and levied by the sheriff on three plantations, called No Mistake, Tyrone and Lake Dick. The No Mistake and Tyrone were sold together, and bought in by James D. Partee, the son of Wm. B. and Sarah D. Partee, for about five hundred and fifty dollars. Upon these places, there was an incumbrance of about eight thousand dollars. Ap-



---

Brief for appellants.

---

pellee bought the Lake Dick plantation for about fifty-six hundred dollars. The bill alleges that by claiming a homestead on No Mistake, bidders were prevented from running it up to its full value. The appellee alleges that after they had, by their fraudulent representations and practices, obtained said lands, then the said W. B. and Sarah D. Partee fraudulently set up a claim of homestead in the Lake Dick place; that the appellee would not have purchased said place at the price which he gave. All the facts, except as to fraud and the claim of homestead in No Mistake, are admitted.

*J. C. Prewell* for appellant :

1. Appellant's counsel reviewed the testimony, and argued that it was conclusively proved that the appellants were entitled to their homestead exemption. That they had lived on the Lake Dick place continuously, except when temporarily absent, since 1852, and the question was one of occupancy or residence, coupled with the intention to make the place occupied or used as a residence the family homestead.

2. That the other property was heavily incumbered, and that the Partees would more likely take their homestead in unincumbered than in incumbered property.

3. Reviewed the testimony as to what transpired on the day of the sale by the sheriff. Witness Barkley swears that the sheriff announced that the homestead was in the other land, and not in Lake Dick. In this he is contradicted by positive testimony, and in addition to this, his credibility is quite successfully attacked.

4. But suppose what Barkley says is true, how can that affect Mrs. Partee? W. B. and Jas. D. Partee had no authority to represent her (she was not at the sale), and she could not have invested them with such authority. A married woman cannot alienate her lands under our laws, except in a certain manner; that is, by joint deed of herself and husband, properly executed and acknowledged. The code of 1857, p. 814, provides that no married woman shall lose her land by the default of her husband.

---

Opinion of the court.

---

In *Treadwell v. Herndon*, 41 Miss., 38, it was held that the husband could not accept or waive service of process for his wife. How then can he act for her in the selection of her homestead?

5. But it is insisted by adverse counsel that the exemption laws do not apply to married women. The exemption laws tolerate no such construction. The act of 1857, which was merely amended by the act of 1865, gives exemption rights to "every citizen of this state, male or female, having a family." The code of 1871 employs the same language. The palpable object of these exemption statutes was to provide "reasonable comfort" for the *family*. It was the *family*, the great unit of our Anglo Saxon civilization, that was to be protected and shielded from want and suffering. That this was the policy intended to be subserved by our legislature is clearly seen by reference to the case of *Moely v. Anderson* in 41 Miss. Exemption laws, like all other statutes, should be construed so as to effectuate the intention of the lawmaking power in enacting them. If the husband owns the homestead it is exempt; if the wife owns it, why should it be taken for debt, and she and her helpless children reduced to beggary and indigence? See the case of *Trotter v. Dobbs*, 38 Miss., 198.

6. The charge of fraud is expressly denied and is not sustained. Reporters find no brief in the record for appellee.

SIMRALL, J., delivered the opinion of the court:

It is manifest that the appellants, nor either of them had a homestead exemption, on the "No Mistake plantation," for the proof is uniform and clear that they never had a domicile on that property. In *Whitworth v. Lyons*, 39 Miss., 467, it was ruled under art. 281, code of 1857, p. 529, that the debtor held the exempt homestead upon the condition of occupancy, and if abandoned, it was subject immediately to seizure and sale by a judgment creditor. The residence of the family was upon the Lake Dick estate, and to that property the exemption attached, if any existed.

---

Opinion of the court.

---

The claim is resisted upon two grounds by the appellee: First. That the appellants are estopped by the conduct of W. B. Partee, the husband, by causing it to be believed by the bidders at the sheriff's sale, that the exemption would be laid upon the No Mistake plantation, whereby that property brought a less price. The preponderance of the testimony, is that nothing was done by the husband to propagate that idea, although it may have prevailed. The husband is not the general agent of the wife. *Treadwell v. Herndon*, 41 Miss., 38. And cannot, by his acts, defeat the wife's interests in real estate, unless thereto authorized and sanctioned by her. Sec. 38, Code 1857, p. 314. When several separate tracts of land are owned by the debtor, the privilege of making a selection of the homestead does not exist; the law confines it to the parcel upon which the family reside, and have their domicile. Occupancy and domicile confer the privilege, which may be lost, by a removal, and acquisition of domicile elsewhere. *Thoms v. Thoms*, 45 Miss., 275.

Mrs. Partee owned as her separate property, three plantations, which were sold under the judgment in favor of the appellee. She resided (as the proof shows) with her husband and children upon the Lake Dick property.

The inquiry is reduced to this: Is a married woman owning separate real estate, and residing upon it with her husband and children, entitled as against her judgment creditor to the homestead exemption? The statute of 1857 describes the person who has the privilege thus: "citizen of the state, male or female, being a householder and having a family." The statute of 1865, thus: "The head of every family, being a white person and a house-keeper." The policy of this legislation is very clearly stated in *Mosely v. Anderson*, 40 Miss., 54, among other reasons that "families shall not be deprived of shelter and reasonable comforts." The right is not dependent "on the merit or demerit of the debtor." The state is concerned that the citizen shall not be reduced to pauperism, by deprivation of means of

---

Opinion of the court.

---

support. The exemption applies, in the words of the act of 1857, to the "land and buildings *owned* and occupied as a residence by such *debtor*." In this case Mrs. Partee was the *debtor*; she was the *owner* of the "land and buildings," and with the family she occupied them as a residence. She was the exclusive owner; the marital rights of the husband did not extend to the income, rents and profits; she could lease without the concurrence of the husband; and could put the lessee in possession of the premises, including the "buildings." Having this large control over the property, she was certainly within the reason of the statute, and we think within its words. The debtor must both own and reside upon the land; must be a householder, and have a family. Under that policy, which secures to the wife, all property owned by her at the time of the marriage, and all subsequent acquisitions, there must be a multitude of instances, where all the means, for the support of the family, are exclusively hers; and the argument is just as strong to protect her homestead, from seizure and sale, as where the property belongs to the husband, and he is the debtor.

The elements which distinguish the privilege (including by express words of the statute both "male and female") are the ownership of the land, residence upon it with a family. These are rather the relations of the debtor to the property, than the subordination of the several members of the family, the one to the other. The husband is the head of the family in the sense that the wife and children are subject to his marital and paternal authority. But he has no authority and control over the wife's property, or the application of it to the support and nurture of the family, unless by her consent. If the land occupied is the domicile of the family, it is her residence, with supreme control, except that she can not mortgage or alien without his approbation. *Bank of La. v. Williams and Wife*, 46 Miss. Rep., 618.

We are of opinion that Mrs. Partee is entitled to the homestead exemption in the Lake Dick plantation.

---

Brief for plaintiffs.

---

Decree reversed, and cause remanded for further proceedings in accordance with this opinion.

---

W. E. PHILLIPS, et al. v. T. T. COOPER, et al.

1. PLEADINGS — DEFECTS THEREIN — WAIVER THEREOF. — A party going to trial without objecting to a defect in the pleadings cannot be heard to complain for the first time in the appellate court. Ample power is given by the statute to amend or correct any defect in the pleadings.
2. EVIDENCE — RECORD — GENERAL RULE. — The general rule is, that a record must be established by the highest attainable evidence. This rule is relaxed in most cases, so that proof may be made by copy. Records are allowed to be shown by the admissions of parties under certain circumstances, but with hesitation and caution.
3. SAME — SAME — ADMISSIONS. — Admissions of parties are admissible where there is not, in the judgment of the law, higher and better evidence in existence to be produced. A record cannot be proven by secondary or parol evidence, unless its loss or destruction be shown.
4. SAME — AFFIDAVIT AND BOND. — The recitals of an affidavit and bond do not assert the existence of valid judgments. They merely assert that the executions on their face purport to be issued on certain judgments. These recitals are not admissions made in open court, nor are they solemn admissions made in the course of judicial proceedings, and hence are not admissible to prove a record.

ERROR to the Circuit Court of Holmes County. Hon. C. C. SHACKELFORD, Judge.

The facts sufficiently appear in the opinion of the court.

*Harris & Withers*, for plaintiffs in error:

It is error to give instructions which are not called for by the evidence, because they tend to mislead the jury; creating in their minds the idea that in the opinion of the court there is such evidence. It is an assumption that such evidence is before them.

There was no evidence to show what amount of property Haywood Phillips owned at the time he sold the mules, nor what was the amount of his debts, and yet the court gives the absurd instruc-

---

Brief for plaintiffs.

---

tions on the 12th page, about the *circumstance* which the law considers in determining the *bona fides* of the sale. What is the weight of this circumstance, especially where the purchaser does not know of the extent of the indebtedness, nor of the debtor's intention?

The court improperly linked the sale of the wild, overflowed lands, with that of two mules, although they did not take place at the same time, and were entirely disconnected; and besides, in this instruction, the last, the court, without any evidence except that twelve months subsequent to this sale, Haywood Phillips went into bankruptcy, directs the jury that if they believe he made the sale to enable him to take the benefit of the bankrupt law, the sale is void. Thus inviting the jury to go on *coupeture*, and such is the effect of all purely abstract instructions. Besides, this is not in accordance with the spirit of the bankrupt law, which declares void only those sales made within six months prior to the bankruptcy.

But the refusal of the court to give the first instruction asked by the claimant is a palpable and fatal error. It is difficult to understand the grounds of such refusal. There can be no title tried without a levy by execution, on a judgment, and surely the property is not liable unless it be the property of the judgment debtor; title in a third party other than the claimant defeats the levy. *Thornhill v. Gilmer*, 4 S. & M., 153. Again, the evidence is manifestly insufficient to uphold the verdict. There is no proof of any judgment execution or levy; there is no evidence of fraud. There is to give to the plaintiffs evidence its full weight, nothing more than ground for conjecture or suspicion. The jury could have been brought to the conclusion they reached only by the influence of the judge through his instructions. There was no evidence of debt at the time, no evidence of the amount of property which Haywood Phillips owned, no evidence of any intention to take the benefit of the bankrupt act, or of knowledge by the claimant of such intention; on the contrary, the plaintiff's own

---

Opinion of the court.

---

witness states that the sale was made in good faith. The lands sold were worthless for cultivation, and when the witness Mercer spoke of the price, he meant to include the cultivated land including improvements. No one could say that wild land, subject to overflow, was worth \$4 per acre in 1867.

The want of an issue is error, as this court has repeatedly held. Reporters find no brief in the record for defendants in error.

TARBELL, J., delivered the opinion of the court.

This is a contest to determine the right of property in four mules levied upon by the judgment creditors of Haywood Phillips. W. E. Phillips claimed the property and gave bond as required by statute. There were instructions given and refused, and verdict for plaintiffs in execution for two of the four mules. A motion for a new trial was overruled. The evidence and instructions, together with several objections and exceptions taken, are fully presented in the record.

The following are relied on as grounds of error: In going to trial without an issue made up under the direction of the court; in admitting claimant's affidavit and bond in evidence to prove the judgment, execution and levy; in refusing to give instructions asked by claimant; in granting instructions asked by plaintiffs in execution; and in overruling the motion for a new trial.

In a case like this, an issue is required to be made up between the parties, under the direction of the court. Code of 1857, p. 532, art. 295; Code of 1871, § 859.

There are no pleadings in the record, nor does it appear that there was any objection or exception to this; nor that the attention of the court was in any way called thereto, if, in fact, there was any neglect in this respect. The record recites the trial on issue joined. Doubtless there was an issue, though probably informal, nevertheless, sufficient. Under art. 180, p. 508, Code of 1857, there was ample power to amend or correct any defect or deficiency in the pleadings. If right in presuming there was

---

Opinion of the court.

---

an issue, however informal, the defects are cured by art. 181, p. 508, Code of 1857; Code of 1871, § 622.

Having gone to trial without objection to the want of or to defect in the pleadings, or in some way calling the attention of the court to the matter, the party can not be heard to complain for the first time in the appellate court. 13 S. & M., 302; 14 id., 119; 6 id., 70; 1 How., 163; 3 id., 360; 4 id., 90; *Learned v. Matthews*, 40 Miss., 210; and other cases cited in *George's Dig.*, pp. 375-7.

Among the instructions for the plaintiff are these:

"If the jury believe from the evidence that the money paid to S. M. Dyer for the two mules in controversy, was not the money of W. E. Phillips, then the law is for plaintiff, and they will so find as to the two mules bought of the sheriff of Yazoo."

"If they believe from the evidence that Haywood Phillips was largely indebted at the time, when it is claimed by W. E. Phillips, that he purchased the mules from his father, that is a circumstance the law considers in determining whether the sale was fraudulent or not."

"It is the duty of the jury to consider all the evidence which has been given in the cause, and if from the evidence they believe the mules were not purchased with the money of W. E. Phillips, the law is for the plaintiff, and they will so find."

"If they believe from the evidence that Haywood Phillips sold the land and mules with the intention of availing himself of the benefits of the bankrupt law, and that intention was known to W. E. Phillips, the sale was void, and they will find for the plaintiffs, although they may further believe from the evidence that W. E. Phillips paid the money for the mules."

With reference to these instructions, it is conceived that W. E. Phillips might have purchased the mules in question with money not his own, and yet have acquired a *bona fide*, legal and valid title, and in the most perfect good faith, though if purchased with the money of his father, Haywood Phillips, or otherwise in fraud of the creditor of the latter, then, indeed, the law and the



---

Opinion of the court.

---

facts would have been with the plaintiffs in execution, but upon the naked proposition stated in the instructions, the court clearly erred. And so upon the two other propositions as to the indebtedness of Haywood Phillips, and his intention to take the benefit of the bankrupt law, the record contains no evidence upon which to base them. It follows that these several and evidently controlling instructions were erroneous.

On the facts, the record presents this state of case :

There is no evidence that the money with which the mules were purchased by W. E. Phillips, was not his own. The theory that he purchased them with the money of his father is unsupported by evidence, and rests wholly in conjecture or suspicion. The case rests almost entirely on the evidence of the claimant, introduced by the plaintiffs in execution. On their face, his statements are fair and consistent. He was unimpeached and unattacked, indeed, was not contradicted in any statement nor by any witness. There is no evidence that Haywood Phillips was indebted in any sum at the date of the sale of the mules ; none whatever of his insolvency, or that W. E. Phillips knew of such insolvency ; nor any that Haywood Phillips contemplated bankruptcy at the date of the transactions involved, or that W. E. Phillips had knowledge of such an intention. For aught that appears, Haywood Phillips became a bankrupt by operations subsequent to the sale or sales brought in question.

In this connection, it is proper to remark that no opinion is intended to be expressed beyond the proper criticism of the record as it now stands, nor is it designed to express an opinion upon the weight of the testimony which, when properly submitted to the jury, is within their peculiar province. Palpably controlling instructions were given, without evidence upon which to predicate them, while others, correctly embodying the case to be made out by the plaintiffs, were refused.

The instructions which follow, were requested by the claimant, but were refused by the court :

---

Opinion of the court.

---

"The burthen of proof is on the plaintiffs in execution in this cause, and, unless the jury believe from the evidence that there were subsisting judgments against Haywood Phillips, and that executions regularly issued thereunder, and were levied on the property in controversy, and that said property, at the time of the levy, was the property of Haywood Phillips, then the law is for the claimants."

"In order to invalidate the sale from Haywood Phillips, the jury must believe from the evidence, that there were judgments against Haywood Phillips, regularly enrolled in the county where the property was situated, and that the sale was made in fraud of the judgment creditors, and without valuable consideration, and the burthen of proof is on the plaintiffs in execution."

Upon what ground these instructions were refused, it is somewhat difficult to conceive. Certainly, it devolved upon the plaintiffs in execution to show judgments, execution, levy, and title to the property levied upon in Haywood Phillips. Code of 1857, p. 533, art. 298; Code of 1871, § 861. Technically, they would be improper, provided there was no evidence to support them.

But this was not the theory of the court below. The affidavit and bond of the claimant were admitted in evidence to prove judgments, executions and levy, and the title of W. E. Phillips was assailed on the idea that Haywood Phillips was the owner of the property. According to the view of the circuit judge, there was evidence of the judgments, executions and levy. If the recitals in the affidavit and bond of the claimant, being admitted, did not conclude or estop him, then the propriety of these instructions is too manifest for elucidation. It may be surmised, that the refusal to give them was upon the assumption of an estoppel.

If this view was taken, it was no less erroneous than the other; for, as will be shown, there is no element of estoppel in this case. At most, the affidavit and bond of the claimant were admissible, as tending to prove the facts for which they were offered; but,

---

Opinion of the court.

---

even in this view, they were not conclusive, and, according to the text writers, the statements contained in the papers mentioned were not more than "unconnected or casual representations." They were not pleadings in the cause; they were not solemn admissions for the purpose of evidence therein; they were not representations which induced any action on the part of the plaintiff in execution; nor were they in the nature of agreements or receipts which recognize the existence of the judgments, executions and levy. Consequently, the doctrine of estoppel was improperly applied, even if the papers designated were admissible in evidence. The instructions refused announced correctly the propositions necessary to be maintained by the plaintiffs in execution to entitle them to recover. Could the judgments, execution and levy be shown in the mode proposed?

The court is unaided in the determination of this case, by counsel, whose arguments contain no reference to authorities, nor to the provisions of the code.

An examination shows several adjudications in this state, substantially recognizing the rule hereafter stated as governing the case at bar: 1 How., 39; 3 ib., 165; 3 S. & M., 234; 10 ib., 549; 6 ib., 179; 7 ib., 111; 13 ib., 635; 25 Miss., 513; 31 ib., 546; 38 ib., 469; 41 ib., 240; ib., 358; 42 ib., 210; and perhaps others; but this being the first attempt in this state, as far as known at present, to prove a judgment, execution and levy by the affidavit and bond of a claimant to property seized in execution, it may be profitable to discuss the point in the light of the text writers and adjudications.

The general rule is quite familiar, that a record must be established by the highest and best attainable evidence which, literally enforced, involves the production of the record itself. 1 Greenl. on Ev., § 501; 1 Ph. on Ev., C. & H. & E. notes, 567, *et seq*; *id.*, 595; 1 Starkie Ev., 389.

This rule, however, is relaxed in most cases, so that this proof may be made by copy. 1 Greenl. on Ev., *supra*. Copies of re-

---

Opinion of the court.

---

ords are (1), exemplifications; (2), copies made by an authorized officer; (3), sworn copies. *Ib.* This rule is also relaxed when records are shown to be lost or destroyed, in which case they may be supplied by secondary evidence; but, ordinarily, in no other instance; *vide*, authorities herein. 1 Starkie Ev., 354, 394; 1 Ph. Ev. C. & H. & E. notes, p. 596. Records are allowed to be shown by the admissions of parties under circumstances, limited, defined and restricted by the authorities, and with hesitation and caution. See foregoing authorities, and 1 Ph. Ev. C. & H. & E. notes, 462. In note 129, *ib.*, it is observed that "an admission is made, *first*, with a view to evidence; *secondly*, with a view to induce others to act upon the representation; or, *thirdly*, it is an unconnected or casual representation." The affidavit and bond of claimant were not made with a view to evidence. The plaintiffs in execution did not act on the representation therein, nor were they made to induce any action on their part. They are, therefore, merely "unconnected or casual representations," for a specific purpose, which will be hereafter defined.

The principle of the rule that the law requires the highest evidence of which the nature of the thing is capable is founded on the presumption that there is something in the better evidence which is withheld, which would make against the party resorting to inferior evidence. *Ib.*, p. 568. Commenting upon this text, in note 163, *ib.*, it is said, "where a party proposes to introduce secondary evidence, under circumstances which clearly presuppose that higher evidence is within his power, it is very natural to presume that he does so from some secret and sinister motive, conscious, perhaps, that should the higher evidence be adduced, it would give a complexion to the case by no means favorable, if not adverse to his interest." This is qualified in the same note (163), in this that the whole doctrine of secondary evidence, when applied to the common instance of the best evidence being proved to be unattainable, rests upon the same principle; all presumption of fraud is then, of course, repelled, and the rule, after first

---

Opinion of the court.

---

disarming the parties of the means of imposition, suffers itself to be relaxed as circumstances in justice shall require, by the admission of the next best evidence.

The adjudications examined indicate the somewhat strict adherence of the courts to the rule just quoted. *Jenna v. Joliffe*, 6 Johns., 9, was an action of trover in which it was held that an admission, oral and out of court, that the property in question was taken by virtue of an attachment, does not make out a justification for the defendant who justifies under the attachment, but he must produce the record.

The *Welland Canal Co. v. Hathaway*, 8 Wend., 480, furnishes a strong illustration of the rigid application of the rule under consideration. Then the defendant had entered into a contract with the company, and given a receipt to them, in the name by which they were known; yet held, that when such company sued as a corporation, the admissions implied by these acts of the defendant did not relieve them from proving that they were a corporation by the highest evidence. And NELSON, J., delivering the opinion of the court, says: "It may be laid down, I think, as an undeniable proposition, that the admissions of a party are competent evidence against himself, only in cases where parol evidence would be admissible to establish the same facts, or, in other words, where there is not in the judgment of the law, higher and better evidence in existence to be produced. It would be a dangerous innovation upon the rules of evidence, to give any greater effect to confessions or admissions of a party, unless in open court, and the tendency would be to dispense with the production of the most solemn documentary evidence."

In the text, 1 Ph. Ev., with C. & H. & E. notes, p. 580, it is stated, that the principle of the rule under review applies alike to the reception of oral testimony, and to the substitution of secondary written testimony. See, also, 2 id., p. 568 and note 474. The court, in *Ingram v. Hall*, 1 Hayw., 193, say that "this rule is always relaxed upon two grounds, either from absolute necessity,

---

Opinion of the court.

---

or a necessity presumed from the common occurrences amongst mankind."

And, in *U. S. v. Rayborn*, 6 Peters, 367, Mr. J. Thompson well says: "Rules of evidence are adopted for practical purposes in the administration of justice, and must be so applied as to promote the ends for which they are designed."

The case at bar was tried in the same county and court, where some of the records involved ought to have been found. No reason is pretended why those records were not introduced as the highest and best evidence. The judgments are quite indefinitely stated in the affidavit and bond of the claimant, as in the counties of Yazoo and Holmes. The executions are described with equal uncertainty. And, it is added, that there were "divers other" judgments and executions in the hands of the sheriff. No jurisdictional, nor other fact, such as nature of action, amount, or date of filing, is given. The burthen of proof was upon the plaintiffs in execution. This proof involved the existence of valid judgments, executions, levy, and title to property in defendant in executions. Codes of 1857 and 1871, *supra*; 1 Ph. Ev., C. & H. & E. notes, p. 582.

The cases when the production of existing records has been dispensed with are well defined. In *Foster v. Trull*, 12 John., 456, a discontinuance was shown by a receipt and written settlement of the cause of action duly signed. *Lyman v. Lyman*, 11 Mass., 317, was an action upon a written receipt of property attached, and an undertaking to deliver it at a future day. *Hehl*, the parties were bound by their undertaking. *Spencer v. Williams*, 2 Vt., 209, was like the last case cited, and *Lowry v. Cady*, 4 Vt., 504, was also precisely similar. These indicate a class of cases not requiring the production of the record for the reasons stated therein. Cases involving the effect of recitals in deeds constitute a numerous class. These recitals are sometimes held to be estoppels, but, in others, are placed on the footing of ordinary evidence in a cause. 2 Ph. Ev., C. & H. & E. notes, 574-576; Bigelow on

---

Opinion of the court.

---

Estoppel, 295, ch. 10, *Recitals*; Reed v. McCourt, 41 N. Y., 435; Herman's Law of Estoppel, ch. 9, secs. 238, 247, 248, 249; id., ch. 12; 1 Starkie Ev., 369 and notes; and cases in Turnipseed v. Hudson, present term.

Neither a deed nor a sealed note can be proved by the mere admission of a party, written or oral. Downs v. Downs, 2 How., 915; Chaplain v. Briscoe, 11 S. & M., 372; 34 Miss., 697; 1 Ph. Ev., with C. & H. & E. notes, p. 425; 2 id., 532, 3, note 458; 1 Starkie Ev., 365, and cases cited in note.

It was well said in Eakin v. Vance, 10 S. & M., 549: "Whether it is competent thus to admit parol evidence, to supply the place of a matter of record, which has been lost, is a question not free from difficulty. The weight of authority seems to be in favor of its admissibility. Many cases on this subject are cited in note 723, 3 Phillip's Evidence, 1067. The rule deduced from them by the annotators is, that generally, in case of a lost or destroyed record, parol evidence is admissible of its contents, especially when no higher evidence is shown to exist. In 1 Greenleaf's Evidence, 581, the rule is laid down in terms equally broad. These learned writers have cited very much the same adjudged cases. By some of them they are sustained; by others they are not, to the full extent of the rule. Following, then, the rule thus established, we are inclined to hold, parol proof of the issuance and due service of citations was admissible, in connection with clear proof of loss, under circumstances not implicating the party claiming the benefit of such testimony, in being instrumental in the loss.

"But the defendants also offered to prove, by the witness, that an order for the sale of the land was granted by the probate court. If any such was made, it should have been placed on record, and there is no pretense that the records of the court have been lost, other than the citations. Indeed, it does not appear, that such order was not placed on record. If it was, it could not be proved by parol, unless the record containing it had been lost. If it was

---

Opinion of the court.

---

not, it cannot be supplied by parol proof. That would be to substitute parol proof in lieu of record evidence, and to dispense with so much of the law as requires the proceedings of the probate courts to be recorded; to substitute witnesses for judgments." This is the language of the late Ch. J. Sharkey, and its similarity to that of Mr. J. Nelson, *supra*, is worthy of note.

To the introduction of the affidavit and bond of the claimant, as evidence of the judgments, executions and levy, the latter objected and excepted.

This action of the court below is assigned for error, and there is thus presented a distinct question for adjudication. The text writers and the adjudged cases consent to a certain conclusion, and this result will appear the more satisfactory and correct from a brief consideration of the character of the recitals in, and the objects of, the affidavit and bond of the claimant. They do not purport to assert substantive facts beyond the execution and levy. Of the executions they are merely descriptive, and of the judgments they are nothing more than the recital of the face of the execution. It is not their object or purpose to assert the existence of the judgments. The interpretation of the affidavit and bond is simply this, that the executions contain the references to the judgments mentioned. Notwithstanding the recitals of the affidavit and bond, the execution might, in a proper case, be quashed on the motion of the claimant.

It is not the object of the affidavit and bond of the claimant to assert facts by way of evidence or to relieve the plaintiffs in execution of proof of valid judgments; but it is to prepare a case under the statute upon which an issue may be made to try the right of property. By the statute itself, *supra*, it devolves on the plaintiffs to show judgments, executions, levy and title in defendant in execution, and this must be done in accordance with the established rules. These rules have already been stated, one of which is, that records must be shown by the highest and best attainable evidence. *Vide*, authorities herein. After indorsement



---

Opinion of the court.

---

and filing, the execution and levy become a part of the record. 15 Wend., 575; 1 Starkie Ev., 284; 3 Hawks, 25; 7 Greenl. Rep., 236; 2 Ph. Ev., C. & H. & E. notes, 377. As shown herein, the rule is, that only when lost or destroyed can a record be proved by parol or secondary evidence. In the record under review, however, there is no pretense of the loss or destruction of the records, and they could not be established in the mode adopted on the trial.

It would be a perversion of justice to construe the recitals of the affidavit and bond as asserting the existence of valid judgments. In legal contemplation they merely assert that the executions on their face purport to be issued on certain specified judgments. It is the language of the execution and not of the claimant. Those recitals are not, in terms, stated as admissions; they were not made "in open court;" they are not *solemn admissions*, or admissions *injudicio*, which have been made in the course of judicial proceedings, either expressly and as a substitute for proof of the fact, or tacitly, by pleading. 1 Greenleaf on Ev., § 27. They are not *unsolemn admissions*, *extra judicium*, which have been *acted upon*, or have been made to influence the conduct of others, or to derive some advantage to the party, and which cannot afterwards be denied without a breach of good faith. *Ib.* They are not pleadings, and, therefore, not necessary to be noticed by the adverse party by plea or demurrer. *Ib.* Nor are those papers in the nature of receipts, agreements or contracts, which are some of the conditions or circumstances under which records and judicial writings may be established by secondary evidence, and without which, admissions will not operate as estoppels. Herman on Estoppel, §§ 5, 6, 320, 335, 336, 414; Bigelow on Estoppel, 614, 615, 609, 612; 1 Greenl. on Ev., §§ 22-27, 96, 186, 205, 521; 1 Ph. Ev., C. & H. & E. notes, 453, note 129, p. 462; 6 Paige's Ch. R., 62; Bigelow on Estoppel, 589, ch. 21; *ib.*, p. 600, *Estoppel in Pais*; Herman's Law of Est., ch. 12; *id.*, ch. 2; ch. 8; ch. 9; 2 Starkie Ev., 27 et seq.; 1 *ib.*, Ph. Ev., C. & H. & E. notes, p. 453, note 129; *ib.*, p. 162.

## Syllabus.

In the case at bar, no "necessity" was shown for the relaxation of the rule requiring the highest and best attainable evidence; and, indeed, if a case were made admitting of secondary evidence, it is manifest that the recitals of the affidavit and bond of the claimant would not even tend to establish valid judgments. 1 Starkie Ev., 159 and notes; ib., 181; ib., 233; 1 Ph. Ev., C. & H. & E. notes, sec. 10, p. 402 et seq. and notes; ib., 422; 425; 2 ib., p. 343; ib., p. 378; ib., p. 510, note 445; 3 ib., pp. 688, 689; 15 Pick., 40; 3 Sneed, 373; 17 Ill., 404; 3 Hill, 215; 15 Mo., 73; 12 John., 546; 13 ib., 529; Edmonstone v. Plaisted, 4 Esp., 160.

Judgment reversed, cause remanded and new trial awarded.

FRANK HAWKINS et al. v. BOARD OF SUPERVISORS OF CARROLL COUNTY.

50	735
85	731
85	734

1. SUBSCRIPTIONS — ART. 12, SEC 14 OF THE CONSTITUTION — EFFECT THEREOF. — The language of this section assumes that the authority of the legislature is necessary to enable a county, city or town to become a stockholder or to lend its credit. And this discretion is prohibited, "unless two thirds of the qualified voters of such county, city, etc., at a special or general election shall assent thereto." This section was manifestly intended to guard and protect the local public from the burden of taxation incident to aid extended to railroad corporations, etc.
2. SAME — HOW PERFORMED. — Aid can be extended to railroad corporations, turnpike companies, etc., by counties or cities, only upon the theory that such internal improvements are for the local public benefit, conducive to the prosperity and common welfare of the local public.
3. ELECTIONS — REQUISITE MAJORITY — RULE AT COMMON LAW. — The rule at common law is that where the electoral body is indefinite, a majority of the votes cast determines the election. This principle was originally applied to corporations aggregate, to the elections of officers, but it has been extended in analogous cases to questions propounded to be adopted or rejected. This rule originated in necessity.
4. SAME — POWER OF THE LEGISLATURE. — In the absence of any constitutional restrictions, it is competent for the legislature to prescribe the

---

Syllabus.

---

requisite majority to carry a measure of aid, and unless such majority vote for the measure, it fails.

5. **ELECTIONS — MODE OF DETERMINING.** — Unless the law under which the vote is taken intends otherwise, the ballot is the test of the number of electors, and that those who refrain from voting acquiesce in what the majority voting do. This is so because of the insuperable difficulty of getting any other mode.
6. **TAXATION — ITS OBJECTS.** — Taxes are burdens imposed upon people or property by the legislature for public purposes. The object to which aid is extended by a municipality must be public in the sense that it will contribute to the convenience and general advantage of the local public, and such aid should only be extended to those objects which have been recognized by legislative and judicial precedents, as such local public objects among which is a railroad. But this has not met the universal approval of the judicial mind.
7. **CONSTITUTIONAL CONSTRUCTION — RULE THEREOF.** — The object of construction applied to the constitution is to give effect to the intent of its framers and the people in adopting it. This intent is to be found in the instrument itself. If the words convey a definite meaning which involves no absurdity or contradiction with other parts of the instrument, then that meaning, apparent on its face, is to be adopted.
8. **SAME — ASSENT — MEANING THEREOF.** — The word assent used in sec. 14, art. 12, of the constitution, must be given its usual and ordinary signification, and that is "agreeing or consenting to," and this can be manifested in an election only by an affirmative action, by actually voting.
9. **REGISTRATION — EFFECT THEREOF.** — The constitution, art. 8, sec. 2, requires all persons entitled to vote, to be registered; it is a prerequisite to the right to vote. Thus there exists, in every county, evidence of the number entitled to vote. In ascertaining the result of an election requiring two-thirds of the qualified voters to assent thereto, the registration books are competent evidence. It would be open to proof to show deaths, removals, etc., subsequently incurred. The term "qualified electors," used in the constitution, means those who possess the constitutional requisites to register.
10. **BOARDS OF SUPERVISORS — POWERS THEREOF.** — These are *quasi* corporations, with a general jurisdiction of the subjects confided to them in sec. 20 of art. 6 of the constitution. The grant of a power of an extraordinary character, such as is not embraced in the general scope of its duties, must be strictly construed. When exerting jurisdiction under a special law, it must act strictly on the condition under which it is given. A county, city or town has no inherent right to become a stockholder or

---

Statement of the case.

---

to give aid to a railroad or other association for making public improvement. If empowered so to do, it must conform to the conditions prescribed in the law. The board of supervisors is made, by law, the instrumentality of the county, but its power does not come into existence except upon certain conditions, which are of the nature of conditions precedent.

11. CASE IN JUDGMENT. — The court reviews at length all the decisions, both state and federal, on the question, as to what defenses can be made to bonds after they get into hands of purchasers for value and without notice. But none of the bonds, in this case, having been issued, this question was not involved, and the court expressed no opinion on the subject.

APPEAL from the Chancery Court of Carroll County. Hon. P. P. BAILEY, Chancellor.

This bill was exhibited by citizens and tax-payers to restrain the issuance and delivery of bonds of Carroll county, to the amount of \$125,000, as a subscription to the capital stock of the Greenville, Columbus & Birmingham Railroad Company, and the levy and collection of taxes for the payment of said bonds. The *gravamen* of the complaint is that the election, by virtue of which the bonds were about to be issued, is void for want of conformity to law, and that two-thirds of the qualified voters of Carroll county had not assented thereto, at a special election, or regular election, held therein. Injunction was granted and issued upon a bond by complainants for \$2,500. On motion of defendants, the chancellor, in vacation, ordered that complainants should, within twenty days, give an additional bond for \$30,000, and on failure to give it, the injunction should stand dissolved. The bond was not given, and on the 10th day of April, 1874, a decree was rendered, in term time, against complainants and sureties on the first bond, for 10 per cent. damages on the amount of taxes levied for the bonds, and due at the time of the injunction, amounting to \$788.09.

An amended and supplemental bill was then presented, showing that, since the occurrences above stated, the bonds of Carroll county had been prepared and executed by the board of super-

---

Statement of the case.

---

visors, and delivered to trustees appointed by them, to be delivered to the railroad company, *pari passu*, with the progress of work in the county, and that these trustees, if not restrained, would deliver the bonds, which are payable to bearer, to the company; and upon this supplemental showing, in connection with the original bill, injunction was prayed against the trustees holding the bonds, and against the board of supervisors. Injunction was granted, by a circuit judge on bond for \$25,000, which was given and the injunction issued. The prayer of the bill is to perpetually enjoin the delivery of the bonds, and to have them cancelled, and to restrain the board of supervisors from the future execution and delivery of bonds for subscription to said company, by virtue of said election, and to prevent the levy and collection of taxes for payment of interest and principal of said bonds. The supervisors, the trustees holding the bonds, and the railroad company, were parties defendant, and an agreement was made and filed by solicitors of the respective parties, as to the facts of the case, and in this, it is stipulated that a *final hearing on the merits* should be had and, if the court is of the opinion that, on the facts, complainants are entitled to a perpetual injunction, it is to be granted; but if, on the facts, they are not entitled to relief, the bill is to be dismissed, and such decree is to be made in reference to the former decree for 10 per cent. damages, as is considered proper. All questions of the sufficiency of the pleadings to present the facts agreed on, are mutually and reciprocally waived by both sides, and the judgment of the court is to be had upon the rights of the parties, as presented by the written statement of facts agreed on, with the object of obtaining *final hearing on the merits*.

## STATEMENT OF FACTS AS AGREED ON.

On the 5th of March, 1872, the Arkansas City and Grenada Railroad Company was incorporated. Acts of 1872, p. 347. The company organized under this charter within ten days after its approval. On the 4th of March, 1873, this company was con-

---

Statement of the case.

---

verted into the Greenville, Columbus & Birmingham Railroad Company. Acts of 1873, p. 606.

On 3d of March, 1873, an application was made by D. A. Butterfield, president, etc., for an election for subscription, by Carroll county, to the G., C. & B. R. R. Co., and on the same day the board of supervisors made an order for submission of the question to the voters.

On the 2d of April, 1873, the registrars of said county filed with the clerk their return of said election, which, at the next meeting of the board of supervisors, on the 23th of April, 1873, was, by order of said board, spread on its minutes, and shows 918 votes for, and 362 against subscription.

Notice of the election was duly given by the registrars, and the election was held by them, and officers appointed by them, and not by appointees of the board of supervisors. Notice of the election was published by the registrars in the official newspaper of the county.

The registration books of Carroll county showed, on 1st of April, 1873, 3,129 names of qualified voters, and it is admitted, as a fact proved, that on 1st April, 1873, there were in Carroll county from 2,000 to 2,500 qualified electors, and that 2,800 votes were polled in said county at the presidential election on the 5th day of November, 1872, and 1,900 votes at the November election, 1873. At the July term, 1873, of the board of supervisors, Butterfield applied for bonds, and the order was made for their issuance and delivery to three trustees named, and an order was made for the levy of 80 *per cent.* on the state tax for 1873. A bond for \$50,000, conditioned for proper application of the bonds or proceeds, was given by Butterfield, with sureties, and was approved. The trustees are men of character, and amply solvent, but are under no bond.

On 24th of May, 1874, an election was held in Carrollton for a subscription of \$20,000, to this company, which resulted in favor of it, and this result was induced by the result of the previous

---

Statement of the case.

---

county election. An election was held in Washington county for a subscription of \$200,000 to this company, and resulted in favor of it, and was influenced, in a large degree, by the result of the election in Carroll county. Prior to the 24th of January, 1874, eight or nine miles of grading on the line of said railroad were done in Carroll county, at a cost of \$20,000, and since that, about \$12,000 worth of work on the road bed in said county has been done. Before the 24th of January, 1874, \$37,000 had been expended in Washington county by the company, payable out of the subscription of that county, and a considerable amount since that date.

In June, 1873, the railroad company entered into a contract with a construction company to complete the work on the whole line. The bonds are all in the hands of the trustees, except \$15,500 of them, which have been delivered to the construction company, on the order of the railroad company, since the 18th of May, 1874.

The relevancy and competency, as evidence of all the foregoing facts, are reserved on both sides, but no objection is made by either, on account of the sufficiency of the pleadings to admit the facts. Objection is made to the competency of such facts under any state of pleadin

The chancellor dismissed the bill, and complainants appealed.

The Constitution of Mississippi, art. VII, is :

SEC. 1. All elections by the people shall be by ballot.

SEC. 2. All male inhabitants of this state, except idiots, and insane persons, and Indians not taxed, citizens of the United States, or naturalized, twenty-one years old, or upwards, who have resided in this state six months, and in the county one month, next preceding the day of election at which said inhabitant offers to vote, and who are duly registered according to the requirements of section three of this article, and who are not disqualified by reason of any crime, are declared to be qualified electors.

SEC. 3. The legislature shall provide, by law, for the registration of all persons entitled to vote at any election, and all persons

---

Statement of the case.

---

entitled to register, shall take and subscribe to the following oath or affirmation:      \*      \*      \*

ARTICLE XII — GENERAL PROVISIONS.

\*      \*      \*      \*      \*      \*      \*      \*

SEC. 5. The credit of the state shall not be pledged or loaned in aid of any person, association, or corporation; nor shall the state, hereafter, become a stockholder in any corporation or association.

\*      \*      \*      \*      \*      \*      \*      \*

SEC. 14. The legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election, or regular election, to be held therein, shall assent thereto.

*J. A. P. Campbell*, for appellants:

Two prominent ideas are embraced in the language employed in section 14, article XII, viz: 1. That a county, city or town shall not become a stockholder in, or lend its credit to, any company, association or corporation, except upon a condition precedent, which is prescribed. 2. The condition precedent, without which that which is prohibited, shall be unlawful.

The prohibition is operative on counties, cities and towns, as well as on the legislature; because, without legislative authorization, a county, city or town cannot become a stockholder, or lend its credit to any company, association or corporation, and legislative authorization, in disregard of the constitutional prohibition, would be void.

The condition is, the assent of two-thirds of the qualified voters of such county, city or town, given at a special election, or regular election, held therein, according to law.

The principle is, that they who are to bear the burden of such expenditure for extraordinary municipal purposes, shall be exempted from it, unless two-thirds of the whole number entitled to



---

Statement of the case.

---

vote in such county, city or town, shall first *assent* to it at the ballot box.

The expression, "qualified voters," means more than those who actually vote. All possessing the constitutional qualifications are qualified voters, whether they vote or not.

When we speak of the "qualified voters" of states, counties, cities or towns, we mean those entitled to vote. This is the universal popular usage. Webster's Dict.; Worcester's Dict.

This is the legal sense of the term "voter." Bouvier's Law Dict.

This is the sense in which the constitution uses it. The phrases "qualified electors" and "qualified voters," and "persons entitled to vote," are employed indifferently and synonymously by the constitution. They are used as convertible terms, signifying the same in the constitution. Thus, in section 3, article VII, "the registration of all persons entitled to vote;" and section 19, article VI, "the clerk of the circuit court, and the clerk of the chancery court, shall be elected by the *qualified voters* of their several counties." As to the other officers provided for by the constitution, the expression is, "by the qualified electors." Thus it is plain that the phrases, "qualified electors," and "qualified voters," in the constitution, are equivalent and always mean those qualified according to the requirements of the constitution to exercise the elective franchise, and as the constitution is to be interpreted by itself, and is to be viewed as a harmonious whole, with its several parts fitly joined together, and each bearing on the other, when it declares a thing shall not be lawful without the assent of a fixed proportion of the "qualified voters," it means those possessing *all* the prescribed qualifications it has enumerated. "As a general thing, it is to be supposed that the same word is used in the same sense, wherever it occurs in a constitution." Cooley's Con. Lim., p. 62; Green v. Weller *et al.*, 32 Miss., 650.

The phrase, "two-thirds," relates to the constituent body — those qualified to vote, and not to those who actually vote, be-

---

Statement of case.

---

cause "a qualified voter," is an expression broader than one who votes, and embraces one who is qualified according to the constitution.

OUR SYSTEM OF REGISTRATION OF VOTERS.

Registration, as provided for by the constitution, is designed to secure the judicial ascertainment and listing of "all persons entitled to vote at any election," and no one is entitled to vote until he has been registered, as provided for. He may be of the prescribed age, and have the prescribed residence, and possess every other qualification, but until he has been "duly registered," he is not a "qualified elector," nor "entitled to vote at any election." Therefore, the books of registration show all "qualified electors," or "persons entitled to vote at any election," or having the "right to vote," as expressed in section 6, article VII.

Registry acts, with reference to elections, have often been merely to regulate the exercise of the right to vote, not to *confer it*. They are usually election regulations established to facilitate the conduct of elections, and not a system by which the possessor of the other prescribed qualifications of a voter perfects and completes his qualifications as such. Under our system, registration is the *investiture*, and the evidence, of the right to vote, and the register of a county is the list of the "qualified voters of such county." Leading Cases on Elections (Brightly), p. 361; Auld v. Walton, 12 La. An. R., 129; Hardesty v. Taft, 23 Md., 512; Anderson v. Baker, *id.*, 531; State v. Bond, 38 Mo., 425; State v. Albin, 44 *id.*, 346; Ensworth v. Albin, 46 *id.*, 453; People v. Kopplekom, 16 Mich., 342; State v. Hilmantel, 21 Wis., 566; State v. Stumpf, 23 *id.*, 630; Byler v. Asher, 47 Ill., 101; Capen v. Foster, 12 Pick., 485; State v. Staten, 6 Coldwell, 233; Cooley's Constitutional Limitations, 603.

"At a special election, or regular election, to be held therein."—Fixing the *mode* in which, and the time at which, the qualified voters shall assent, so as to exclude assent by petition, or written consent, or oral consent, and every other mode than at the ballot

---

Statement of case.

---

box, and by ballot, and at a special election, or regular election, to be held therein, according to law. The clause under consideration has no reference to the *number* of voters, or the prescribed proportion, "two-thirds," but simply prescribes the *manner* in which the requisite proportion of the whole number of the "qualified voters of such county, city or town, shall assent thereto."

"*Shall assent thereto.*" — That is, shall *act* in agreeing to it. *Assentio* — not remain passive; not be silent, nor acquiesce in, but shall *vote* for the proposition. There is not a word in the constitution about *dissent*.

The opponents of the proposal are not required to attend a special election or regular election. Two-thirds of the qualified voters of such county, etc., must attend the polls, and vote for it, and thus *assent* thereto. The contrary view requires a certain proportion of the qualified voters of a county, city or town to *dissent*, whereas the constitutional requirement is, that two-thirds must *assent*.

The term *assent*, implies affirmative action, and the idea is not met by inaction or indifference.

## GENERAL REMARKS.

The state is absolutely prohibited from lending its credit in aid of any person, association or corporation, or becoming a stockholder in any corporation or association: Article XII., sec. 5, constitution. Because it was determined that in no case could it be proper for the state to do this. But, as it was considered that there might be public enterprises, affecting particular localities, as counties, cities and towns, it was determined that they should not be *prohibited* from aiding them, but *restricted* in such way as to preclude the danger of indiscretion or abuse by prohibiting them, not absolutely, but until in a given case two-thirds of those entitled to vote, as prescribed in the constitution, should *assent* to it, at a special or regular election — that the entire property and industry of county, city or town, shall not be charged with such bur-

---

Statement of the case.

---

den, without the affirmative action of so large a proportion of those interested, as to preclude the idea of injudicious action. This was deemed a sufficient safeguard, and yet consistent with the proper exercise of the qualified right of counties, cities and towns to aid suitable public enterprises, worthy of such aid, as evinced by the support at the polls of so large a proportion of those to be affected as two-thirds of the whole number of those qualified to vote.

The constitution, which our present one succeeded and superseded, did not prohibit the state from being a stockholder in any corporation or association, and it permitted the state to lend its credit or pledge its faith, and it contained no prohibition or restriction upon counties, cities or towns, in this respect.

Without this restriction, it were competent for the legislature to authorize counties, cities and towns to become stockholders in, or lend their credit to, any company or corporation upon terms which the legislature might prescribe, but bitter experience having demonstrated the danger of such power, the great importance of the subject led to the incorporation into the organic law of this provision to cure this mischief, and prevent the great evil which might result from the absence of such restriction.

Consider the old rule, the mischief and the remedy, and what construction will most effectually cure the mischief and advance the remedy. Can it be doubted that, to require two-thirds, by actual count, of all the qualified voters of county, city or town, will more effectually accomplish the manifest purpose of the framers of the constitution to shield the citizens against improvident aid to public enterprises by counties, cities and towns? Cooley's Const. Limitation, 55.

This construction best accords with the general spirit of the constitution in its prohibition to the state, and restriction on counties, cities and towns on this subject, and will better subserve its purpose.

"The whole is to be examined with a view to arriving at the

---

Statement of the case.

---

true intention of each part." Cooley's Const. Limitations, 57 *et seq.*

## OBJECTIONS CONSIDERED.

The objection that it is impracticable to determine with accuracy whether two-thirds of all the qualified voters of a county, city or town have assented, is unfounded. It is capable of as absolute certainty as human testimony can ever furnish. A comparison of the poll lists, showing who voted, with the registration books, showing who were entitled to vote, will show *prima facie*, at least, what proportion voted assent, and it is matter of evidence who of those registered (as the list is corrected and revised within a few days before every election) have died, become disqualified or permanently removed, and have thus ceased to be qualified voters; and, if there are names improperly on the registration lists, because of the want of other constitutional qualifications, that can be shown, as matter of fact, and, if striking off all names of persons dead, disqualified or removed after registration, and those proved to have been improperly admitted to registration, the whole number is reduced so as to embrace only those legally entitled to vote, it is easy, by comparison of those voting with those entitled to vote, to ascertain what proportion have assented. Evidence may easily be had of deaths and removals, and certainty may be attained.

The registration books are expressly declared by law to be *prima facie* evidence of the right to vote. Code 1871, section 373, and copies from them are competent evidence. Code, section 814. They are competent evidence on common law principles. 1 Star-*kie on Ev.*, 195; 1 *Greenleaf Ev.*, sec. 483.

But, it is said, it is contrary to the genius of our system to consider of those who stay away from the polls. This is conceded as applied, ordinarily, to elections. The functions of government must be performed with ceaseless regularity.

*The assent of no proportion* of qualified voters is required to elect any officer, but in this the assent of "two-thirds of the qualified vot-

---

Statement of the case.

---

ers of such county," etc., is required. In the one case reference is had to the necessities of government and the convenience of its administration, and the *preclusion of the failure* of an election. But in the matter under consideration, a wholly different rule is introduced.

---

THE QUESTION CONSIDERED WITH REFERENCE TO THE AUTHORITIES.

---

The common law doctrine, applied to corporations, as to *definite* and *indefinite* numbers, and usually cited against the view here contended for, is rather an authority in support of it.

Counties are not corporations. They are so feebly endowed with corporate life as to be called *quasi* corporations. They are unlike the *towns* of the New England states, where "all of the qualified inhabitants meet and directly act upon and manage, or direct the management of their own local concerns." Dillon Municipal Cor., section 10, *et seq.*

Under our system of definite judicial ascertainment by registration of the qualified voters, a county approaches far more nearly the character of a *definite* number than an *indefinite* number of persons or corporations composing the body. Dillon Municipal Corporations, section 215.

No decision, which can be cited, has any application to our constitutional system, as will be shown on a particular examination of the cases. *Ratione cessante lex ipsa cessat.*

The cases which may be cited as precedents for the proposition that "two-thirds of the qualified voters of such county" means two-thirds of those voting, are the following, viz: Railroad v. County Court, 1 Sneed., 637; State v. Mayor, 37 Missouri, 270; State v. Binder, 38 Missouri, 450; People v. Warfield, 20 Illinois, 159; People v. Garner, 47 Illinois, 246; People v. Wiant, 48 Illinois, 263; Township v. Rogers, 16 Wallace, 644.

A careful examination of these cases, so far from opposing the construction contended for in this argument, will vindicate it, as

---

Statement of the case.

---

applied to the constitution of Mississippi. In each stress was laid on the absence of any other *means of ascertaining the number of legal voters*, except the poll lists. As no means had been provided for ascertaining and determining who were legal voters, except the decision of the inspectors of elections at the ballot boxes, as shown by the poll lists, it was an inference that the legislative purpose was, that a "majority of those who actually vote" should determine.

The constitutional scheme of Mississippi as to elections, voters and registration, is *sui generis*, and unlike that which existed in the states of Tennessee, Missouri and Illinois, when the above cited cases were decided. We must follow to their logical results the several provisions of our own constitution on this subject. *Ut res magis valeat, quam pereat.*

Under our system the question is not, necessarily, nor allowably, to be determined by a count of ballots. This may well be allowed where no notice is taken of a voter until he appears at the polls, and is pronounced a qualified voter by the inspectors of the ballot box, and deposits his ballots, and is *registered* as a voter at that election; but the same reasoning which supports this, requires, under our system, the adoption of the registration books so showing the number of qualified voters.

EXAMINATION OF CASES SUPPORTING THE VIEW CONTENDED FOR  
IN THIS ARGUMENT.

The only state whose constitution is like ours, in its restriction upon counties, cities and towns, in this respect, is Missouri, whose constitution, adopted in 1870, has the restriction in the very words of ours, and in the only case reported on this subject, *Carpenter v. Lathrop*, 51 Mo., 483, the court, speaking of this provision, say: "This is a limitation on the power of the general assembly to confer the right, or power, upon counties and towns, to take stock in the companies named." In that case, the vote for subscription was unanimous, but the subscription was

---

Statement of the case.

---

held to be unauthorized, because, it appeared to be probable (among other things) that two-thirds of the qualified voters had not assented. The court refused to accept the two-thirds of those voting as decisive, for all who voted had voted for the subscription.

In *State v. Winkelmeier*, 35 Mo., 104, in which was construed a statute, which made the exercise of power to depend on the authorization of a "majority of the legal voters" of a city, it was held that the act required a *majority of all the legal voters* of the city, and not merely a majority of those voting, and the court seized upon the evidence to show that a majority of all did not vote. In all those cases, where power to act in such matters has been made to depend on the assent by petition of two-thirds of the tax payers, it has been held that the consent of the prescribed number must be given, and that this is an *affirmative* matter to be shown by those who claim the existence of the power. *Starin v. Genoa*, 23 N. Y., 439; *Gould v. Sterling*, ib., 456; *Benson v. Mayor, etc.*, 24 Barb., 248; *People v. Mead*, 36 N. Y., 224; *Duanesburgh v. Jenkins*, 40 Barb., 574; *State v. Saline Co.*, 45 Mo., 242.

In *Bissell v. Jeffersonville*, 24 How. (U. S.), 288, it is distinctly affirmed that where a law uses the expression, "majority of the legal voters," it means a majority of all, to be ascertained and determined as matter of fact.

In *Green v. Weller*, 32 Miss., 650, it was conceded by distinguished counsel, and affirmed by Judge Handy, delivering the opinion of the court, that the expression, "majority of the members of each house," in art. 7, sec. 9, of the then existing constitution, meant a majority of *all who had been elected, and were entitled to seats*.

Wherein does that expression require a majority of all the members entitled to sit, more than the expression, "two-thirds of the qualified voters of such county," requires two-thirds of all the qualified voters entitled to vote? Art. 7, sec. 9, of the



---

Opinion of the court.

---

former constitution, was on a kindred subject to that under discussion.

THE QUESTION NOT AFFECTED BY THE DECISION AND ACTION OF  
BOARD OF SUPERVISORS.

It would be monstrous that the board could conclusively decide the question as against the attempt to prevent the illegal issuance of bonds. There is, in that case, no remedy against the most flagrant outrage upon the constitution and rights of the people. The citizen must have the right to appeal to the courts, and they are *not powerless* to afford protection. Dillon on Municipal Corporations, section 416, et seq.; Knox County v. Aspinwall, 21 How. (U. S.), 539; Bissell v. Jeffersonville, 24 ib., 288; New London v. Brainard, 22 Conn., 552; Tash v. Adams, 10 Cush., 252; Hood v. Lynn, 1 Allen, 103.

Appellants are not estopped. Bigelow on Estoppel, p. 480, 484; ib., p. 600; Herman's Law of Estoppel, sections 321, 327, 332, 409, 425, 435, 442. In the following cases the doctrine of estoppel was applied to citizens and tax payers: Society, etc., v. New London, 29 Conn., 174; Prettyman v. Supervisors, 19 Ill., 406; President v. Frick, 34 ib., 405; Maher v. Chicago, 38 ib., 266. But those cases will be found to present features widely different from this.

*D. A. Holman*, on the same side, filed an elaborate brief, relying upon the same points substantially, and citing the same authorities.

*Harris & George*, for appellees, withdrew their brief and failed to return it in time.

SIMRALL, J., delivered the opinion of the court:

This bill was exhibited by the complainants, tax payers of Carroll county, to restrain the issuance and delivery of the bonds of Carroll county to the amount of \$125,000 to the Greenville, Columbus and Birmingham Railroad Company. On the 3d of March, 1873, an application was made by D. A. Butterfield, president of the company to the board of supervisors, to submit to the electors of the county the proposition of making the subscription. On the

---

Opinion of the court.

---

same day the order of submission was made, a special election was appointed for the 1st of April thereafter. The election was accordingly held. On the 2d of April, three registrars, Ely, Kimbrough and Doyle, filed with the clerk of the board of supervisors the returns, by which it appears that 918 electors voted for the subscription, and 362 against it.

Subsequently at a day in July, the board of supervisors declared that the proposition for subscription had been carried by a vote of two-thirds of the electors, and directed the bonds to be executed by the president, and placed in the hands of three trustees, named in the order. On the 1st of April, 1873, the registration books showed the names of 3,129 voters. It was admitted as proved, but its competency and relevancy was reserved, that there were from 2,000. to 2,500 qualified voters in the county; that 2,500 votes were polled at the presidential election, the 5th November, 1872, and 1,900 votes at the November election, 1873.

On these facts, the question was elaborately and ably discussed by counsel, whether, First, the election in favor of subscription, was carried in accordance with section 14 of article 12, general provisions of the constitution. It is as follows:

"SEC. 14. The legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election, or regular election, shall assent thereto."

The language assumes that the authority of the legislature is necessary to enable the county, city or town to become a stockholder or lend its credit, and then puts a limitation upon legislative discretion and authority in an important particular, viz: the authority shall not be granted "unless two-thirds of the qualified voters of such county \* \* \* at a special \* \* \* or general election shall assent thereto."

The practice had grown up, and had been very generally adopted by the states, of allowing the civil municipal subdivis-

---

Opinion of the court.

---

ions — as counties, cities and towns — to become stockholders in, or lend their credit to, railroad corporations, turnpike companies, etc., on the approving vote of a majority of the electors of such municipality. This was done by enabling acts of the legislature. The aid thus extended to these public local improvements was usually in the form of municipal bonds; the interest, and ultimately the principal, to be paid by taxes levied upon property. The power of taxation is delegated to these local bodies upon the theory, that the purpose to which the money is applied is for local public benefit, conducing obviously, and in a special manner to the prosperity and common welfare of the local community. At the time of the adoption of the constitution, the power of the legislature to authorize municipal aid to these enterprises, coupled with the delegated authority of taxation, was well established, both by legislative precedents and judicial decisions in this and the other states. It would be useless to cite the cases. There was great uniformity, too, in the terms upon which the stock might be subscribed, and the bonds issued. One condition was the vote of a majority of the electors.

The 5th section of the 12th article, prohibits the pledging the faith of the state in aid of any person, corporation \* \* \* nor shall the state become a stockholder in any corporation or association. The 14th section allows the right to a municipality which the 5th section denied to the state, but not "unless two-thirds of the qualified voters at an election assent thereto."

Manifestly, the intent was to guard and protect the local public from such burdens, unless upon the assent of two-thirds of the voters, manifested by an election.

It is contended on the one side, that the intendment of the 14th section is satisfied, if two-thirds of those who vote at the election, are for the subscription, although that may be less than two-thirds of the qualified voters of the county. On the other side, it is contended, that the question is not carried unless two-thirds of all the qualified electors vote for it.

---

Opinion of the court.

---

The rule at common law was, "After an election has been proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected. Although a majority of the assembly abstain from voting, their silence will be construed an assent to the majority of those who vote." An. & Am. Corp., § 127; Kyd. on Corporations, 1 vol., 422, states the rule thus: "An act done by a simple majority of a collective body, which concerns the common interest, shall be binding on the whole."

Dillon Municipal Corp., 1 vol., § 215, states the principle thus: "If an act is to be done by an indefinite body, it is valid, if passed by a majority of those present at a legal meeting. No matter how small a portion these may constitute of the whole number entitled to be present, those who stay away are conclusively presumed to assent to what may be lawfully done by those who attend."

The statement of the principle by the supreme court of Pennsylvania in the St. Mary's church case, 7 S. & R., 517 is: "The fundamental principle of every association for self government, is that no one shall be bound except with his own consent, expressed by himself or his representatives, but actual consent is immaterial, the assent of the majority being the assent of all."

The principle which runs through the cases is, that a majority of the legal voters who choose to vote, constitutes an election. A dissent without a vote is of no avail. *Oldknow v. Wainwright*, 1 Wm. Bl., 229; *Rex. v. Foxcroft*, 2 Burr, 1017; *First Parish of Sudberry v. Stearns*, 21 Pick., 154.

This principle, that where the electoral body is indefinite, a majority of the votes cast determines the election, originally applied to corporations, aggregate, to the election of officers, has been extended in analogous cases to questions propounded to be adopted or rejected by voters. 1 Sneed. (Tenn.), 688; 21 Pick., 148; 37 Mo., 272; 38 Mo., 450; 16 Wallace, 644; 9 B. Monroe, 326.

It may be admitted, that in the absence of any constitutional

---

Opinion of the court.

---

limitation or restriction, the legislature would be entirely competent at discretion, to prescribe the conditions upon which a county could give aid to a railroad corporation. It might make the terms the consenting vote of two-thirds of the qualified electors, and that those who did not vote for the aid should be counted against it. Under such a law it would be difficult to ascertain the number of electors in the county. Nevertheless the company claiming the aid must show affirmatively the requisite majority for it. That question was suggested in Warefield's case, 20 Ill., 160. The constitution of Illinois allowed the removal of a county seat, on a vote of a majority of the electors of the county. The embarrassment of determining the result was alluded to, and commented upon by the court. The same point arose in Wiant's case, 48, Ill., 263. And the court went outside of the return of the votes, on the proposition submitted, and took the vote cast at the same election for circuit judge, which was larger than that given for the removal of the county seat, as evidence of the number of votes in the county.

The principle upon which the court rested its judgment was, that the return of the officer of the votes on the proposition of removal of the county seat was not conclusive of the number of voters in the county. But the vote given for the circuit judge might be looked at as showing that there were a larger number of voters than those voting for the removal. It is distinctly conceded in the carefully considered case reported in 1 Sneed., *supra*, that the law might refer to the vote cast for governor at the last election, or for the president, as a test of the number of voters.

If those who do not vote are taken as conclusively assenting to the majority, then the application of that rule in this case would have precluded the court from any inquiry or necessity of inquiry, as to the number of electors in the county. It accepted those who voted for the circuit judge, as evidence that there were more voters than those who cast ballots for or against the removal. The court

---

Opinion of the court.

---

had within reach, safe, tangible and reliable means of ascertaining the fact, and availed itself of it.

None of the authorities deny or dispute the position that if the law requires a majority of the electors of a county, city or town to vote for a proposition, before the subscription or credit shall be given, or the other thing contingent on the vote shall be done, that the proposition fails, unless such majority is given. Is the ballot box the test of the result?

The practical question presented is, whether the constitution means if one, or five, or one hundred vote for the aid, the measure is carried; or whether it means that a definite number of the entire body entitled to the ballot, must assent by an affirmative vote, that definite number being two-thirds of the whole body.

Unless the law under which the vote is taken intends otherwise, the *ballot* is the test in two particulars: first, of the number of the electors, and second, if there be those who do not vote, then that they acquiesce in what the majority voting do. The rule in its original application to corporations, and the election of officers, originated in necessity. That there should be no vacuum in those offices in which the constituent body or the public had an interest, there was no mode by which the elector could be compelled to vote. That there might be no interruption in the functions of office, a majority choosing to exert their privilege was sufficient to fill the place. But as we have seen in cases other than the election of officers, the count of the ballots is accepted as the criterion of numbers, not because of the inflexible rule of law, but of the seemingly insuperable difficulty of getting any other which is not loose, shifting and unreliable. The necessity of the rule for the sort of elections for which it was framed, is apparent. When the practice obtained in these late years of giving municipal aid to railroads, and other public enterprises, on an approving vote of the people, the courts applied the rule in reference to the election of officers. If no other

---

Opinion of the court.

---

or better test was furnished of the number of voters in the municipality; if it can be gathered from the terms of the law under which the election is held, that a majority of two-thirds of the constituent body is requisite, that majority is necessary to a choice. That doctrine is illustrated in a late English case, of *Regina v. Guardians of St. Martin's in the Fields*, 5 Eng. L. & Eq. Rep., 361. The officer (treasurer) was to be elected by two-thirds of the electors present. Eleven voted for one man, and ten for another (the *chairman not voting*.) "For the chairman being present ought to vote, and is considered a voter present, in order to determine whether either candidate had a majority of the votes." Here the "electors present," were the "constituent body." A majority of them was necessary to a choice. The court had information of the fact, nor did they adopt the doctrine that the "chairman" assented to the vote of "the eleven," because the particular law required otherwise.

Recurring to the 14th sec. of art. 12, and giving to the words their ordinary signification, what is their obvious and grammatical import? It seems to be plain that the "county \* \* \* shall not become a stockholder or lend its credit, \* \* \* unless that is (upon no other condition than) two thirds of the qualified voters \* \* \* at a special or general election, \* \* \* shall assent thereto." All would agree that the requisite number "two-thirds" must assent. That "assent" to fulfill the demands of the language must be given or expressed, in some mode or other, at an "election." The two-thirds thus assenting, must be that number of the "qualified voters of the county." The debatable ground begins at this point. How within the intent of the constitution shall this "two thirds" manifest or give evidence at an *election* of "assent," by staying away from the polls, or being present and voting? The constitution which, in the 5th section of the same article, had absolutely prohibited the faith of the state from being pledged or loaned for such a purpose; and which was putting restrictions on the power of the legislature, to author-

---

Opinion of the court.

---

ize counties, etc., incurring such burdens, unless a great majority of its voters desired it, ought not to be so construed, as that one hundred, or five hundred, out of three thousand voters, could by any possibility create the debt. Reading both sections together, and they announce this policy: The credit of the state shall not be pledged or loaned in aid of any person, association or corporation. But if it is the desire and policy of a county, \* \* \* etc., to aid any association or corporation in any public work; as a railroad or canal, or turnpike, etc., etc., of great local benefit, it may do so if deemed prudent and wise by two-thirds of its qualified voters expressed at an election. We think clearly that the constitution means an overt, affirmative assent evidenced by voting for it.

The power granted to the municipality is, in effect, a power to tax: "Taxes are burdens imposed by the legislature upon persons or property, to raise money for 'public purposes.'" Manifestly the object to which the aid is extended must be "public," in the sense that it will contribute to the convenience, prosperity and general advantage of the "local public." It has been established by authority, that aid to a railroad corporation is a "public purpose," for which the county may lend its aid. But that has not met the universal approval of the judicial mind. But aid to a steam saw and grist mill company, *Allen v. Inhabitants of Jay*, 60 Maine Rep., 124, or for any private business of manufacturing, or for aid to a school established by the will of a citizen, *Jenkins v. Andover*, 103 Mass., 94, or a school which was a private enterprise, *Curtis v. Whipple*, 24 Wis., 350, are not "public purposes" for whose benefit taxes may be imposed, although such businesses may contribute to the improvement of the community where located.

Long usage and acquiescence have declared railroads as one of the "public purposes," for which municipalities may impose taxes on persons and property. It would not be safe, wise or prudent to push the power beyond the line already established in usage,



---

Opinion of the court.

---

legislative and judicial sanction. Nor should we be inclined to tolerate that construction of the 14th section which would authorize the board of supervisors to lend the aid or credit of the county, to "any person, association or corporation," unless for an object which in the history of legislation and judicial sanction is recognized as "public" to the county. It is not within the limits of legitimate and constitutional taxation, to impose burdens upon persons and property to build up private enterprises and fortunes. It is pressing the power of taxation, the strongest committed to the government, to its extreme limit, when it is referred to any number of the electors of a municipality to impose the onus of taxation, upon not themselves only, but upon other property holders and persons now voters, in aid of some enterprise or public work, not owned and controlled by the municipality, not necessary for the uses and purposes for which such municipality is created, but advantageous in the sense that it contributes to the advancement and increase of the wealth and business of its inhabitants. The power is dangerous, and greatly liable to abuse. Whilst this is so, it is also true that a wise, cautious and prudent use of county credit may result in public good.

We are persuaded, that the constitution, for the protection of minority interests, intended that this power of creating a debt to be paid by taxation, for a local "public object," should only be exercised, after it had been approved by that preponderating number of the voting class (two-thirds) as would give reasonable assurance that not only the object upon which the aid was bestowed, was a proper one, but also that the judgment of those most interested approved the loaning of the credit. It meant to put it out of the power of the few to impose the debt upon the many. To make it impossible for those proposing to construct a railroad (for instance) to procure the bonds of a county in its aid, unless the scheme had the deliberate approval of the people, manifested by their votes.

When a statute, or section of the constitution is expressed in

---

Opinion of the court.

---

general or limited terms, the law makers shall be intended to mean what it has plainly expressed, and consequently no room is left for construction. *United States v. Fisher*, 1 Cranch, 244. The object of construction applied to the constitution is to give effect to the intent of its framers, and the people in adopting it. This intent is to be found in the instrument itself.

The observations of Bronson, J., in *People v. Purdy*, 2 Hill (N. Y.), 35, have great force; remarking upon the danger of departing from the import and meaning of the words employed to express the intent, and hunting after probable meanings, not clearly embraced in the language, he says: "In this way the constitution is made to mean one thing by one man, and something else by another, until in the end, it is in danger of being rendered a mere dead letter, and that too when the language is so plain and explicit that it is impossible to mean more than one thing, unless we lose sight of the instrument itself, and roam at large in the fields of speculation."

To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the "words" convey a definite meaning, which involves no absurdity or contradiction with other parts of the instrument, then that meaning apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed; and neither the courts nor the legislature have a right to add to or take from that meaning. *Newell v. People*, 7 N. Y., 97; *Denn v. Reid*, 10 Pet., 524; *Leonard v. Wiseman*, 31 Md., 264; *Cooley Con. Lim.*, p. 57.

What is the meaning of the word "assent," as used in the 14th section? Lexicographers define it, "the act of the mind in agreeing to, or assenting to a thing," "consent," or "agreement." Consent is defined to be, "agreement in opinion or sentiment," "the being in one mind," "accord," "concurrence." Giving to "as-

---

Opinion of the court.

---

sent" then its natural signification, it would be the act of the minds of two-thirds of the voters of the county, "agreeing to," or "assenting to" the subscription, "consent to the subscription." The constitution of New York of 1821 contained this provision: "The 'assent' of two thirds of the members, elected to each branch of the legislature, shall be requisite to every bill creating, continuing or altering \* \* any body politic or corporate." Plainly, the obvious intent is, that all such measures must receive the "vote" of two-thirds of the members elected. *People v. Purdy*, 2 Hill, 85. The word "assent" is here used in the sense of expressing by affirmative act, to wit: voting, concurrence, consent or agreement that the bill shall pass.

The constitution is explicit in laying down a test of the number of votes requisite to approve an amendment proposed. 13th Art.: "And if it shall appear that a majority of the qualified electors, voting for members of the legislature, shall have voted for \* \* the amendment, then it shall be inserted," etc.

The constitution of Tennessee, adopted in 1870, contained this clause: "No part of the county shall be taken off without the consent of two-thirds of the qualified voters of such part." The question considered in *Cocke v. Gooch et al.*, 5 Heiskel, 308-9, et sequiter, was whether the clause meant two-thirds of those actually voting, or "two-thirds of the qualified voters in the part of the county proposed to be "taken off." It will be remarked, that the language is of tantamount import, with that of the 14th section of the 12th art. of our constitution, unless the word "consent," in the former, has a more specific meaning than the word "assent," in the latter. It is manifest that "assent," as used in the constitution of New York, above quoted, meant an expression of opinion by a "vote." That comports, as we have seen, with the definition of the term. In the Tennessee constitution, the "thought" embodied in the word "consent" is the same, viz: that "two-thirds of the qualified electors" shall manifest their concurrence by their votes, and such was the intent of the provision as held by the court.

---

Opinion of the court.

---

There must be the requisite number as defined in the constitution, voting for the measure, otherwise it is defeated. Say the court: "Instead of presuming that those who did not vote, meant by their nonaction to submit to the result of a count of the votes cast, a proper reading of the constitution authorizes those who do not vote, to conclude that their vote against the project could avail nothing, as a fixed numerical strength was absolutely necessary to the success of the new county." The court refers to art. 2, sec. 27, of the same constitution, for an instance of the vote cast at the election determining the result. That section authorized cities, counties \* \* to give credit, to a person, corporation \* \* on the assent of three-fourths of the *votes cast* at such election. The bill was brought to restrain the organization of the new county, because the project had not been approved by the constitutional vote.

That was the "fact" upon which the title to relief rested.

Perhaps, under the machinery contemplated in the 2d and 3d sections of article 9 of the constitution, and the statutes passed to give them effect, better means exist in this state than elsewhere of determining the result of an election, such as was held in this case. The 2d section declares the qualification of voters, their requisite sex, age, residence in the county and state, registration, and citizenship of the United States. The right of those having the other qualifications to vote is completed and evidenced by registration. 3d section, and statutes on the subject. This section intends a registration "of all persons entitled to vote at any election," so that the evidence may exist in favor of those who have acquired the right by moving into the county, attaining majority, etc. There exists, therefore, in each county, a registration of the list of voters, which ought to show, with approximate accuracy, the names of those entitled to vote "at any election." In ascertaining, therefore, the result of an election requiring two-thirds of the qualified voters of the county to assent thereto, we think that the registration books are competent evidence on the

---

Opinion of the court.

---

point of the number of qualified voters in the county. It would be open to proof to show deaths, removals, subsequently incurred, disqualification, etc. When the constitution uses the term "qualified electors," it means those who have been determined by the registrars as having the requisite qualifications, by enrolling their names, etc. It would be a fair construction of the 14th section, to hold that the "two-thirds" meant that number of the whole number whose names had been enrolled as legal voters. That furnished official evidence of those *prima facie* entitled to vote. But, in this case, in addition to the information contained in the registration books, it is admitted that there were from 2,000 to 2,500 qualified voters in Carroll county at the date of this election. The proposition submitted received less than half of 2,000 votes, and, of course, did not have the assent of *two-thirds*, as required by the constitution. The difficulty of proving the number of voters in the county has been obviated by this admission.

We are of opinion, therefore, that this proposition to subscribe for stock and issue bonds did not receive the assent of the number of voters required by the constitution.

There is no power, then, in the board of supervisors to impose the burden on the county, unless something has intervened which estops the tax-payers from claiming the relief sought.

The boards of supervisors are a *quasi* corporation, with a general jurisdiction of the subjects confided to them in the 20th section of 6th article of the constitution; after the enumeration follow the words, "and perform such other duties as shall be provided by law." The grant of power to such a body, of an extraordinary character, such as is not embraced in the general scope of its duties must be strictly construed. When exerting jurisdiction under a special law, it must act strictly on the conditions under which it is given. In *Ballard v. Davis*, 31 Miss. Rep., 526, it is said the terms of the law conferring a special jurisdiction (there a tax for levee purposes) must be strictly pursued in the mode prescribed in the statute. The same rule has been enforced else-

---

Opinion of the court.

---

where in reference to similar bodies. Commissioners of Hamilton v. Mighels, 7 Ohio St. Rep., 109, 115; Striker v. Kelly, 7 Hill, 9.

Another manifestation of the principle is, where one acts under delegated authority, as an agent or an officer of the government. There is no controversy or disagreement in the courts as to the general rule. In Hagan v. Barksdale, 44 Miss. Rep., 191, it is said: "those dealing with others (not in virtue of original, inherent right), but acting as delegates for others must, at their peril, know the extent and measure of the authority. Others are bound, if at all, by reason of the authority delegated for that purpose."

In the matter of the Floyd acceptances, 7 Wallace, 676, the doctrine is applied in all its force, to the acts of an agent or officer of the government, in transactions in negotiable paper. The person who deals with him knows that he acts by virtue of a delegated power; "must, at his peril, see that the paper on which he relies comes within the power on which the agent acts. This applies to every person who takes the paper afterwards. For the protection which commercial usage throws around negotiable paper can not be used to establish the authority by which it was originally issued." "These principles," say the court, "are applicable to the transactions of government."

A county has no inherent right to become a stockholder in a railroad corporation, or any other association for making public improvements, nor can it issue its bonds for such purpose.

If empowered so to do, it must conform to the conditions prescribed in the law. By the statute, the board of supervisors is made the organ and instrumentality of the county. But its power does not come into existence except upon certain conditions, which are of the nature of conditions precedent. Those are an approving vote of the constitutional majority at an election, assenting thereto. If the requisite notice of the election has not been given, or it has not been held at the proper time and place,

---

Opinion of the court.

---

or if no election at all has been held, or if held, and the proposition has not received the requisite vote, then the terms upon which the board can put in motion its statutory power, to make the subscription and issue bonds, have not come into existence. If these, or any of these recitals are true, a subscription would be invalid, and the bonds would be without warrant of law to uphold them. As between the county and the corporation or association to whom bonds are issued, such defense can be made.

How far these or any of these matters of defense may be set up against a *bona fide* holder of the bonds acquired in due course of business, the authorities are not agreed.

Many of the state courts, after great deliberation, have held that the officers of a municipality, inasmuch as they are exerting an extraordinary power, do not bind the county to pay the subscription or the bonds, unless issued in conformity to the law, which is, as to them, a power of attorney, and that any person proposing to purchase bonds, must, at his peril, enquire as to whether they are legally issued or not.

Other courts, especially the federal tribunals, hold that if a statute authorized the county or other municipality to give the aid, and issue the bonds, then the presumption will be indulged conclusively in favor of the *bona fide* holder; that all the conditions and prerequisites have been complied with, and that the county or municipality is estopped from setting up such non-compliance with law. Perhaps in all the cases in the supreme court of the United States, the bonds themselves contained a recital of a compliance with the conditions precedent, or the records of the county imported on their face such compliance. The cases in that court are *Knox County v. Aspinwall*, 21 How., 539; *Bissell v. Jeffersonville*, 24 How., 287; *Pendleton v. Amy*, 13 Wallace, 298; *Lexington v. Butler*, 14 Wallace, 282; *Grand Chute v. Winegar*, 15 Wallace, 355; *Kennicott v. Wayne County*, 16 Wallace, 452; *Moran v. Miami County*, 2 Black, 722; *Gelpcke v. City Dubuque*, 1 Wallace, 175; *Supervisors v. Schenck*, 5 Wallace, 772.

---

Opinion of the court.

---

If the bonds contain no recitals, and the purchaser has not examined the records of the county to see whether the county authorities have complied with the law, whether he occupies such vantage ground, as would shut off such defenses, has not perhaps been precisely decided by the supreme court.

Many of the state courts hold to the opposite view, viz: The invalidity of the bonds may be pleaded against a *bona fide* holder, in that the bonds were not issued by the municipal authority, in the circumstances authorized by law. *People v. Mead*, 24 N. Y., 124; *Harding v. Rockford & R. R. Co.* (supreme court, Illinois), *Chicago Legal News*, vol. 5, 424; 11 Ohio St., 183; *State v. Green County*, 54 Mo., 574; *State v. Callaway County*, 51 Mo., 402; *Carpenter v. Lathrop*, 51 Mo., 483.

It is not involved in this case, and we forbear to express an opinion upon it, as to how far the county or the tax payers are estopped, and concluded from setting up the character of defenses, we have been considering, after the bonds may have been purchased by a *bona fide* holder.

The bonds in question have not been negotiated. No person has yet acquired the privileges of a *bona fide* holder.

The legislature had no power in the first instance to authorize the subscription and issuance of bonds, except upon the vote of the county.

If the project was not adopted by the requisite majority, plainly the legislature could not by a curative statute, cure so radical an infirmity. If there were mere irregularities in the election, at which two-thirds of the voters give their assent, these may be cured; but not the failure to hold an election, or a failure of the requisite majority. For that would be to impose the obligations on the county, in circumstances not warranted by the constitution and laws.

It has been argued also that the decision of the supervisors that the project was approved is conclusive on the county. That which confers the authority on the board is the vote of the two-



---

Syllabus.

---

thirds. The canvass of the votes, and decision of the board, is but evidence of the fact. If the requisite favorable vote has been actually given, then the condition has occurred, upon which the county can insist upon the aid being given; and the railroad corporation have a right to demand the subscription and bonds. The conclusion of the board, that the majority has been one way or the other, is not conclusive on the tax payers or the railroad corporation. The authority to the board passes, or fails to pass, by the vote. Whatever might be the effect of the decision of the board, in an action by the holder of the bonds, who took on the faith of the county records, it is not conclusive in a suit between the county and the railroad corporation, nor between the parties to this suit. *Lewis v. Commissioners of Bourbon County*, 1 Central Law Journal, 617, and cases hereinbefore cited.

We are satisfied that the complainants are not estopped by any or all the matters relied upon, from a contestation of the validity of the bonds. The suit was instituted before the bonds had been negotiated, and before third persons had acquired vested rights in them. We refer to the cases hereinbefore cited. *Citizens Savings and Loan Association, etc., v. City of Topeka*, Sup. Ct. U. S., February 9, 1874; Cent. Law Jour. (1875), pp. 156-9.

Decree reversed, and judgment may be rendered in this court.

---

JACOB HALFACRE et al. v. W. D. DOBBINS.

PRACTICE—ADMINISTRATOR'S BONDS—REMEDY THEREON.—A bill in equity will not lie against an administrator and the sureties on his bond for a *devastavit* or misappropriation of the assets of his intestate. In such cases the remedy is at law upon the bond.

APPEAL from the Chancery Court of Winston County. Hon. T. C. LYON, Chancellor.

This was a bill in equity filed by the appellee as a judgment

---

Statement of the case.

---

action of H. L. Halfacre, deceased, and for such other creditors as might come in and be made parties against Jacob Halfacre, the administrator and the sureties on his bond as such administrator, appellants.

The bill is against the appellants as principal and sureties, and seeks a recovery against them upon the administration bond, upon the ground of *devastavit*, and charges a large balance due by the administrator as shown by his annual accounts returned and of record, and from proceeds of sales of property not accounted for. It shows a judgment at law for the amount due appellee against the administrator of the intestate, and an execution issued thereon and returned *nulla bona*, and alleges in substance, that the administrator had in his hands assets sufficient to discharge said judgment, but has failed to apply them to its payment. The prayer is for an account, and that the administrator be held liable to complainant for a *devastavit*, and for a decree against the administrator and the sureties on his bond, etc.

To this bill the appellants filed a demurrer which the record shows was overruled; but there is no demurrer in the record and the grounds of it are not known, and the appellants answered the bill, etc.

On the final hearing the court decreed that the complainant recover of the administrator and sureties on his bond the amount of his judgment at law and costs, etc. From this decree appellants appealed and assigned as error:

1. The court erred in overruling the demurrer to the bill; the same should have been sustained, and the bill dismissed.

2. That the court erred in not allowing the — exception of appellants to the account and report of the commissioner appointed to state and report an account of the amount due by appellant, as administrator, for which he was chargeable; and in charging said administrator for the claim of R. D. Johns, and in holding that the facts appearing of record made said administrator liable for a *devastavit* for not having collected such claim as assets of his intestate.

---

Brief for appellants.

---

3. That the court erred in taking jurisdiction, and in rendering a final decree against the appellants for the amount as stated in said decree, upon the case as made by the pleadings and proof.

A. H. Handy, for appellants, argued the following points, orally :

1. The court below had no jurisdiction to maintain the bill: 1. As to the *general* jurisdiction of a court of equity, it is conferred by the present constitution in these words: "full jurisdiction in all matters in equity." Art. VI, sec. 16. This consisted of matters of general equity cognizance, as recognized and practiced in this state, at the time of the adoption of the constitution; and of such special matters of jurisdiction as had been conferred by statute on our chancery courts *before* the adoption of the constitution, and were, *at the time of its adoption*, recognized and practiced upon as subjects of equity jurisdiction. *Green v. Creighton*, 10 S. & M., 160, 163, in which jurisdiction in equity is denied even against the administrator alone. *Buckingham v. Owen*, 6 S. & M., 502, 505-6, which was a bill by a judgment creditor against sureties on administration bond, for *devastavit* by administrator, against whom judgment at law had been obtained. *Jones v. Coon*, 5 S. & M., 751; *Neylans v. Burge*, 14 ib., 204; *Searles v. Scott*, ib., 95, 98.

And even in cases where the aid of equity was invoked to set aside fraudulent settlements made in the probate court by administrators, it was settled, in the two last cases cited, that the jurisdiction in equity extended no further than to *set aside* the settlement for fraud, and then to leave the matter of further settlement by the administrator, and proceedings incident thereto, to the probate court, which had exclusive jurisdiction thereof. These cases settled the doctrine, that cases like this are purely *legal* in their nature, and not cognizable in equity. It was also settled that the legislature had no power to confer jurisdiction of matters purely at law, upon courts of equity. *Farish v. State*, 2 How. (Miss.), 826; *Freeman v. Guion*, 11 S. & M., 58, 65.

---

Brief for appellants.

---

An exception to the general rule, that courts of equity are restricted to the exercise of such jurisdiction as embraced only the general subjects pertaining to that court, as recognized and practiced as such, is admitted, where, by act of the legislature, such powers are enlarged in a particular respect, and such additional matters come into practice as subjects of equity jurisdiction, and afterwards a new constitution is adopted, giving general jurisdiction in equity to the court of chancery, as was done by our constitution of 1832. In such case, it has been held, that such additional matters of jurisdiction conferred by statute, on the court, *before the adoption of this constitution and practiced at the time of its adoption*, as subjects of equity jurisdiction, will be taken to be embraced in the general terms of the new constitution, and to become matters of equity jurisdiction within the meaning of the grant in the constitution. *Servis v. Beatty*, 32 Miss., 84, 85.

But this rule does not embrace this case; because, at the time of the adoption of the present constitution, the statute under which jurisdiction in this case is claimed, had not been passed, and no such jurisdiction was practiced in courts of equity.

The cases above cited were decided with reference to the provisions of the constitution of 1832. But exactly the same words are transcribed in the present constitution, and should now receive the same construction, upon the familiar principle that, in adopting the same provisions, on the subject, contained in the old constitution, they must be held to have been *adopted with the interpretation* given to them by the courts, and in force when the present constitution was adopted. It is true, that the rule of general jurisdiction in equity of matters of administrators' accounts, and of remedies upon their bonds, has been extended much beyond that which has prevailed in the courts of this state; and this extended jurisdiction has been sanctioned by the supreme court of the United States, in the cases of *Green v. Creighton*, 23 How., 106; and *Payne v. Hook*, 7 Wall., 425. It is questionable whether the rules held in these cases would justify the jurisdiction

---

Brief for appellants.

---

in this case, which has no feature of equity cognizance, not even the necessity for an account; but is purely *an action in equity* against the administrator and his sureties *on his bond* for a mere *devastavit*, alleging assets in his hands, the recovery of the complainant's judgment, return of *nulla bona*, and failure to pay the judgment. But, be this as it may, these rules have no force in the courts of this state, whose constitution and laws, in cases depending in its own courts, are "a law to ourselves," and must be the rule of action therein, independently of the decisions of the supreme court of the United States, in the absence of any question as to their validity with reference to the constitution of the United States. With that exception, we are bound by our constitution and laws, not in conflict with the federal constitution, and by the interpretation of them by our courts. Story Conf. Laws, § 618, b.

2. The second branch of jurisdiction of our courts of equity is conferred by the present constitution, in the identical words of the constitution of 1832, giving it to the probate courts, thus of "all matters testamentary and of administration." Art. 4, sec. 18, 1832. The present constitution adopting the same terms of grant as that of 1832, must be taken as adopting the former provisions, *with the interpretation* given to them by the courts, and thereby to have incorporated it as so interpreted, as above stated. When the present constitution was adopted, it was perfectly settled in our courts that the probate court, under the same terms of jurisdiction, had no power to render a decree upon an administration bond against the administrator and sureties, but that they must be sued at law, especially the sureties, after the liability of the administrator had been fixed by proper proceedings against him. *Green v. Tunstall*, 5 How., 651; *Green v. Creighton*, *supra*; *Dinkins v. Bailey*, 23 Miss., 284.

And our present chancery courts, in being vested by the present constitution with the same identical powers, in this respect, formerly vested in the probate courts, exercise only such powers as

---

Brief for appellants.

---

were appropriate to the probate courts in this particular. This jurisdiction is simply transferred from one court to another under a different name.

The chancery courts created by the present constitution, exercise two distinct branches of jurisdiction: one in "all matters in equity;" and the other of "all matters testamentary and of administration." But the distinction between the two branches of jurisdiction was in no wise altered as to the subjects proper upon which each was to be exercised; and each branch is to be administered as distinct from the other, and by rules and modes appropriate to each. 44 Miss., 429; ib., 304; *Troup v. Rice*, at last term not yet reported. It is therefore manifest that by neither of the above clauses of the present constitution was the jurisdiction conferred to entertain this bill.

3. The jurisdiction was not given by Code 1871, § 976. 1. That provision is *prospective*, and can only apply to bonds thereafter to be executed. Its language respects future bonds—"shall have been executed." The bond here sued on was executed before the statute was enacted. 2. Its terms apply to a "proceeding" *in the course of the administration*, and cannot properly be applied to the bond of an administrator which is merely preliminary to the granting of administration. It is not to be presumed that it was intended to apply to sureties on such bond, since it was the settled rule that there was no privity between them and the court; that they could not be called to account then, as they bore no official relation to the court which could give it jurisdiction of them. *Tunstall v. Green*, 5 How. (*supra*); *Lipscomb v. Postell*, 38 Miss., 488. This construction is sanctioned by *Bernheimer v. Calhoun*, 44 Miss., 429, decided with reference to this provision.

4. But the provisions of this statute are clearly unconstitutional. 1. Upon the reasons above stated, as to the jurisdiction of the court. 2. As to the sureties, it impaired the obligation of their contract.

That contract was, that the administrator shall perform his

---

Brief for appellee.

---

proper duties, and pay over to the persons entitled, any moneys which shall be adjudged by the proper court to be due in his administration; and, in default thereof, that the sureties shall pay the amount.

This was the essence of their contract, and until the liability was fixed judicially by an account taken against the principal in the probate or chancery court, no suit could have been instituted against them therefor. *Tunstall v. Green, supra*.

This fixing of the administrator's liability was a *condition precedent* to the sureties' liability to suit; and this essential right for their protection is taken away by this statute.

Nor is it merely a matter pertaining to the *remedy*, but it goes to the essence of the sureties' rights. *Musgrove v. Railroad*, this term; and it impairs the rights of the sureties, by destroying the conditions precedent to their obligation to pay, existing at the time they entered into the contract. *Coffman v. Bank of Kentucky*, 40 Miss., 31-32.

*Frank Johnson*, for appellee:

1. The constitution of 1869 provides: "Chancery courts shall be established in each county in the state with full jurisdiction in all matters in equity and of divorce and alimony; in matters testamentary and of administration, in minor's business and allotment of dower, and in cases of idiocy and lunacy, and persons *non compos mentis*." Art. VI., sec. 16. The probate court was abolished; and in addition to equity powers, the chancery court was given jurisdiction in all "matters testamentary and of administration." Under the statutes in force prior to the adoption of the code of 1871, the probate court could not render a decree against the sureties on an administrator's bond, and enforce it by final process, nor had the court of chancery this jurisdiction.

In *Washburn v. Phillips* (decided in 1846), 6 S. & M., 431, the court held that the probate court could not enforce the bond, but that it should be sued on at law.

It may be fairly concluded that the *probate court* did not have

---

Brief for appellee.

---

this jurisdiction, for the reason that in regulating the general powers and jurisdiction given in general terms by the constitution, the legislature saw fit to require these bonds to be sued on at law.

The *chancery court* did not have the power to proceed against the obligors in these bonds for an account, and enforce their liability by decree, because the constitution gave the general jurisdiction in "matters of administration" to the probate court, and the statutes in providing the machinery for carrying out these powers, contemplated an account in the latter court, and a *suit at law* on the bond under the *direction of the probate court*, and a final application of the proceeds of the judgment when recovered, to be made by the probate court. The jurisdiction is broadly given in all "matters testamentary and of administration."

As precisely the same terms were used by the former constitution in defining the jurisdiction of the probate court, it is important to ascertain the meaning of these terms as construed by former adjudications.

It is apparent that it was left in a great measure to the legislature to define the boundaries of these general powers, to prescribe what were properly "matters testamentary and of administration," and to provide the modes and forms of proceedings, and the remedies to be administered by the court.

As a consequence, the probate court had certain common law powers, it had equity powers, and exercised certain functions of the ecclesiastical courts. It was composite in its structure; and this structure was erected by the legislature; and these different powers were provided by statutes, under the general jurisdiction as defined by the constitution. In *Carmichael v. Browder*, 3 How., 253, it was *held* that the constitution did not confer a "limited jurisdiction," but a general jurisdiction over *all the subjects* mentioned. In *Servis v. Beatty*, 3 George, 52, the question was the constitutionality of a statute which gave the probate court, in effect, the power of enforcing the specific performance of contracts



---

Brief for appellee.

---

respecting the sale of land by the decedents. The argument at the bar was strongly pressed that the constitution had given to the chancery court, equity jurisdiction, and to the court of probate, jurisdiction in "matters testamentary and of administration," and that it was incompetent for the legislature to confer equity powers on the latter tribunal. The court held the statute to be constitutional, upon the ground that it was left in a great measure to the legislature to define the scope of the constitutional terms; and that the subject of the suit might well be said to belong properly to the administration of estates. This is an instance where a statute conferred equity jurisdiction on the probate court. Again in *Smith v. Craig* 10, S. & M., 450, the statute of December, 1833, which gave the court the power to partition land where the interest of a deceased joint tenant, tenant in common, or coparcener descended to his heirs, was held to be constitutional. In this instance, a common law power was conferred on the probate court. This remedy previously had existed at common law, by writ of partition. See, also, 44 Miss., 212; *Harrington v. Wofford*, 46 id., 31. In *Root v. McFerrin*, 8 Geo., 17, it was said that the power of the court over the lands of a decedent was not given in terms by the constitution, nor did it exist inherently in the court, but was conferred by statute. The last case is cited in support of the proposition that it was necessarily left to the legislature to define the jurisdiction and to provide particular remedies, in giving effect to the powers granted generally by the constitution.

In *Farish v. The State*, 4 How., 170, a statute which gave the chancery court jurisdiction over all suits against the state, and clearly conferred *common law powers* on the court, was held to be constitutional. The court said that "it was left to the legislature to define the jurisdictions of the several courts," and whenever the legislature creates new subject of chancery jurisdiction, it becomes immediately one of those "matters of equity" of which the court has full jurisdiction by the constitution.

---

Brief for appellee.

---

2. The jurisdiction can be maintained under the clause of the constitution which gives jurisdiction to the court "in all matters of equity." All that has been said as to the nature of the bond and the character of the obligation of the principal and sureties, is applicable to this view of the case. The administrator is but a trustee, executing a trust under the direction of the court.

On general principles of equity jurisprudence, I submit the power to enforce the bond would be properly incidental to the administration of the fund and subject matter. *Payne v. Hook*, 7 Wallace, 425; 23 How., 108; *Pratt v. Northam*, 5 Mason, 105; 2 Story Eq. Jur., 1287; *Moore v. Armstrong*, 9 Porter, 697; *Moore v. Wallis' heirs*, 1 Marsh, 488; *Carrol v. Connet*, 2 J. J. Marsh, 198.

3. It is insisted that under the law in force when the bond was executed, a preliminary proceeding for an account against the administrator was necessary before the sureties could be sued on the bond; and this became in effect a condition precedent to the right of action against the sureties. This objection rests on a mistaken view of the law. Art. 123, p. 435, Code, 1857, expressly provides that a suit in the first instance might be brought against the sureties without first proceeding against the administrator. This statute is conclusive on this point.

4. The appellants were deprived of no constitutional right in this proceeding.

It is not the trial by jury, but the *right* of trial by jury, that is declared inviolate. *Lewis v. Garrett's adm'r*, 5 How., 434. The statute (§ 976) does not deny the parties the right of trial by jury. Under § 976 and § 1032, they could have had a jury trial. A statute which does not *prohibit* a jury trial is not unconstitutional. *Parsons v. Bedford*, 3 Pet., 447; 1 Randolph R., 1; 1 Washington R., 357. The right of trial by jury may be waived by voluntarily submitting to the jurisdiction of the court, and not demanding a jury, certainly, in a case where the court, at the instance of the party, can award a trial by jury. *Logwood v. Huntsville Bank, Ala., R.*, 23; 5 How., 434; *Ratcliff v. Ratcliff*, 12

## Syllabus.

S. & M., 141; I respectfully submit that the decree of the chancellor should be affirmed.

SIMRALL, J., delivered the opinion of the court:

The question presented by this appeal, and which was well argued at the bar, is, whether a bill can be sustained by a judgment creditor against the administrator, and the sureties on his bond, on the suggestion of a wasture or misapplication of the assets, or a withholding them from creditors without any just reason. It is not controverted, that as jurisdiction was divided among the several courts, under the constitution of 1833, the remedy of the complainants would have been at law upon the administrator's bond. In *Smith v. Everett*, decided at this term, we have held in principle that such is the remedy under the present arrangement of jurisdiction of the courts. That case is decisive of this.

It would follow, therefore, that the decree must be reversed, and judgment in this court, dismissing the bill, but without prejudice to the complainant's rights in any other proper suit.

---

JAMES D. STEWART et al. v. WILLIAM E. ROSS et al.

1. HUSBAND AND WIFE — CURTESY — ITS REQUISITE. — The estate, by the curtesy at the common law, was dependent upon marriage; seizin of the wife of a freehold of inheritance; birth of issue capable of inheriting; survivorship of the husband.
2. SAME — RIGHTS OF HUSBAND AT COMMON LAW. — Marriage gave the husband the rents, etc., of the wife's lands, and a seizin with her and in her right; these rights lasted during the coverture. The birth of issue made initiate a life estate, which became vested, was subject to alienation and liable for husband's debts. Being vested, no act of the wife could defeat it, but her estate is reversionary, depending on the life estate.
3. SAME — SAME. — The husband must have seizin in his wife's right. If, therefore, the husband does not take actual possession, or have the right of immediate possession, which may be exerted by his voluntary act,

---

Statement of the case.

---

curtesy does not arise, as if there be a particular freehold estate outstanding, or adverse possession.

4. **SAME — SEPARATE ESTATE OF WIFE UNDER STATUTE.** — The statutes declaratory of the property rights of married women, so far as they go, emancipate from marital disability and confer legal rights, capacities and powers. The wife may acquire real estate by purchase, devise or inheritance; she has the exclusive right to the income, may lease her lands and improve them. They are not subject to the debts or contracts of the husband, but are liable for her ante nuptial obligations. These incidents and interests of the wife are inconsistent with the conditions of the curtesy estate at common law.
5. **CURTESY — ARTICLE 28 OF CODE OF 1857 — HOW DEFEATED.** — This statute continues the curtesy estate in "all the lands of which the married woman may die seized or possessed." The right of the husband is made contingent upon the seizin of the wife at the time of her death. The estate does not become absolutely fixed and vested in the husband by the birth of issue. The right only becomes vested when the wife dies seized. It is subject to be defeated by the joint conveyance of husband and wife; by sale under legal process for the wife's debts, and, lastly, by a last will disposing of the estate as allowed by the statute of 1867.
6. **SAME — SAME — TO WHAT IT ATTACHES.** — Curtesy attaches, under the statute, to all lands not conveyed by the husband and wife, not sold for her debts, nor devised by last will, or in the words of the statute, to the lands of which she died seized.
7. **SAME — CASE IN JUDGMENT.** — Mrs. R. acquired the lands in question in 1870. She made a will, devising them to her children, and died in 1871: *Held*, that the surviving husband did not take an estate by the curtesy.

**APPEAL** from the Chancery Court of the First District of Hinds County. Hon. E. W. CABANISS, Chancellor.

This was a bill filed by Stewart and McCutchen against William E. Ross, Joshua and Thomas Green, D. N. Barrows and Geo. A. Smythe; and also against W. B. Ross, Marion S. Ross and James B. Ross, minors, children of W. E. Ross and Marion S. Ross, deceased.

Stewart owned an interest in a judgment for \$6,369, rendered in the circuit court of Hinds, on the 21st day of November, 1867, against W. E. Ross; and McCutchen owns a judgment rendered in said court on the 20th day of May, 1868, against said

---

Brief for defendants.

---

W. E. Ross for \$731.40, both judgments having been duly enrolled.

1st. The object of the bill was to subject to these judgments in the order in which they are named, an insurance fund in the hands of Barrows and Smythe and J. & T. Green, arising from a loss under a policy of insurance covering the dwelling house on the *land* in controversy.

2d. And also to have certain deeds cancelled, by which the title to the land in controversy was placed in the hands of Mrs. Marion S. Ross, deceased, upon the ground that their conveyances were made to hinder, delay or defraud the creditors of W. E. Ross, and particularly in fraud of the rights of the complainants.

3d. And in the alternative, the bill prayed, in the event that the land was decreed to belong legally and properly to Mrs. Ross, deceased; then, that the life estate of W. E. Ross in this land, as tenant by the curtesy, be decreed to be sold for the payment of the judgments; and that the will of Mrs. Ross, by which she devised the land to her children, and by which she provided (as contended by respondents) that her husband should not have any estate by the curtesy, or which, in effect, was intended to defeat this estate, should be pronounced void as to the complainants' rights. \* \* \*

The two grounds first stated were abandoned by the complainants.

This leaves but one question in the cause for adjudication, viz: whether the will of the wife divested the husband of his estate by the curtesy as against the judgment creditors of the latter.

*Frank Johnson*, for appellants, contended:

1. That the estate of Ross in the land, as tenant by the curtesy, was not divested as against his creditors by the last will of his deceased wife. At common law, upon the birth of issue, the husband became tenant by the curtesy initiate, and, upon the happening of this event, the estate assumed the status of property, and became a vested estate in land. At the death of the wife, the estate became consummate.

---

Brief for appellants.

---

2. That the curtesy estate was essentially distinct from the life estate of the husband during the marriage; that is, the right of the husband to the income of the wife's lands. This estate depended upon two conditions—a valid marriage and the seizin of the wife; the death of the wife ended this estate. Bishop on Mar. Wom., § 529. When all the conditions exist upon which curtesy depends, then this estate is, upon the death of the wife, a continuation of the estate which terminated by the death of the wife. 2 Kent, 130; 1 Atk., 609; 1 Bish. Mar. Wom., 473.

3. That curtesy initiate is a vested estate, and is regarded in law as property, as a legal estate, and can be taken, under execution in attachment, for the husband's debts. It is different from dower, in this, that while dower is a mere right in action which may be waived or enforced at the wife's pleasure, and is not, before assignment, strictly speaking an estate in land, curtesy, on the other hand, is an exact and definite one, covering the whole land, and no assignment is necessary. Bishop, § 511. This estate, by the curtesy, is a freehold in remainder for life, dependent on his survivorship, with remainder in fee to the heirs of the wife, and this estate in him is "land," and liable to respond to his debts by execution or attachment. Day v. Cochran, 2 Cush., 274; Lessee of Jas. Canby v. Porter, 12 Ohio, 80; Lancaster Co. Bank v. Stauffer, 10 Penn., 398; Mattocks v. Stearns et ux, 9 Ver., 326; 2 Washburn's Real Property, p. 167, § 50; 1 Bishop on Mar. Wom., § 511.

And it may be sold by the husband during the life of the wife. Griffin v. Sheffield, 38 Miss., 359; 16 Mass., 189; 3 Dallas, 488.

And the estate cannot be prevented from vesting by the disclaimer of the husband. Watson v. Watson, 13 Conn., 85; 2 Wash. Real Property, p. 167, § 50.

4. By the code of 1857 (art. 24, p. 336), the income arising from the real estate is taken from the husband and given to the wife. But this does not in any manner affect his estate as *tenant by the curtesy*. For a marriage settlement might have secured this in-

---

Brief for appellants.

---

come to her separate use, and still the husband would have been entitled to his life estate at her death by the curtesy. But art. 28, p. 337, saves to the husband his right of curtesy to the "extent allowed by law;" that is to the extent allowed at common law. And art. 29 restricts this estate to one-third of the land if the wife leaves surviving her a child or children of a former marriage or descendants of them. The *marital right* of the husband to the income of the wife's realty during their joint lives is taken away; and where the wife leaves a child or children of a former marriage, the *curtesy* is restricted to one-third of the wife's land.

The rights of the husband are no further affected or changed, and to show that the right to curtesy was not intended to be taken away, art. 28 expressly provides, that "*nothing herein contained shall deprive the husband of his right to curtesy.*"

Thus, under the statute, nothing would defeat the curtesy, that would not have defeated it at common law. And under the statute his right to the estate depended upon the same condition as at common law, viz: marriage; seizin of wife; birth of issue and and survivorship. The power of alienation given to the wife by art. 4, p. 307, and the form of acknowledgment required by art. 33, p. 313, Code, 1857, cannot affect the right of curtesy *except by the husband's consent*, for the lands can only be conveyed by the joint deed of the husband and wife; that is, by his concurrence in the conveyance. These clauses of the statute in no way impaired or changed his right to curtesy as it existed at common law, for at common law he had the right to convey the estate by his own deed; and by the statute his concurrence in the wife's deed would have the same effect, viz: to pass the title to his estate by the curtesy.

The power given by the statute (art. 26), to the wife, of charging her separate estate, cannot affect the husband's curtesy in this case, for the wife died seized and possessed of the land.

5. In *Ryan v. Freeman*, 36 Miss., 177, it was said that the statute act 1846 contemplated all the conditions upon which the curtesy

---

Brief for appellants.

---

depended at common law. And in *Malone v. McLaurin*, 40 Miss., p. 168, it was held under the law of 1857, the four common law conditions are stated, and the court, *as to the seizin of the wife*, the estate was made to turn entirely upon the question, **THERE WAS A SEIZIN DURING COVERTURE.**

Thus treating the estate as at common law, and also in *Redus v. Hayden*, seizin during *coverture*, was made the test. 43 Miss., 685. Thus stood the law in 1857, and under this law upon the birth of issue, the estate vested; and it then became a freehold in remainder for life, dependent upon survivorship with remainder in fee to the heirs of the wife. It was a legal vested estate possessing all the elements of property, and certainly, except where there were children of the wife by a former marriage, as at common law.

This estate could be taken on execution, and was subject to the husband's debts.

6. The act of 1867 provides that a married woman may, without the consent of her husband, dispose of *her* separate estate by last will and testament. This act in so far as it affects the rights of the husband must be strictly construed. His rights will not be construed away by implication. Upon strict construction of this statute, his estate by the curtesy is not affected. The statute would be construed to mean, she could make the devise subject to his estate by the curtesy. But there are other views that are decisive of the proposition that his rights are not affected. This act is in terms an amendment of the prior statutes respecting the same subject matter, and it must, on a familiar principle of construction, be construed, *pari passu*, with the statute of 1857. In other words, it must be regarded *as if it had been in terms contained in the statute of 1857*. It does not purport to be, nor is it a *repeal* of any prior statute, or of any clause in the prior statute, but it is an amendment of the existing statute in reference *to the separate property of married women*. It must therefore be so taken and construed as if it was embodied in the statute of 1857, this would



---

Brief for appellees.

---

leave in force the express saving clause in favor of the husband's estate by the curtesy, and this clause would be considered in conjunction with the *amendatory act*. It *must be* considered that the legislature in making the amendment did so in reference to, and subject to this express proviso or reservation as to the husband's estate. But I submit that the sound rule of construction is to consider together all the various statutes in reference to this subject, in order to see intelligently what changes were designed to be made. When the various statutes were consolidated in the Code of 1871, both the statute of 1867 and the proviso in the law of 1857, were brought forward and reënacted. Sec. 1785, Code 1871, gives the wife the power to make a will, and sec. 1786 expressly provides that nothing contained in the statute should deprive the husband of his right of curtesy to the extent allowed by law. This is a legislative construction of the two former statutes. Properly construed, there was *nothing* inconsistent between the law of 1857 and the amendment of 1867, and in proof of this, the two provisions are incorporated side by side in the Code of 1871. This general rule of construction was followed in *Apple v. Ganoung*, 47 Miss., 199.

*It is clear that the devisees of Mrs. Ross, deceased, took the fee simple in the lands subject to the life estate by the curtesy of the husband.* It is certain that the disclaimer of the husband could not prevent this estate vesting in him. *Watson v. Watson*, 13 Conn., 85; 2 Wash. Real Prop., 167, § 50. His conveyance of this estate, or formal release after the estate had become consummate by the death of the wife, would not have been good against the liens of judgment creditors.

*Shelton & Shelton*, for appellees, insisted :

1. That the curtesy of the husband at *common law* was essentially different from what it is under our *statute*. By the *common law* the husband is jointly seized with the wife, and has a freehold estate. 1 Wash. on Real Estate, p. 140, sec. 47; pp. 141, 276, sec. 2. By the *statute* it remains hers as fully as if she were un-

---

Brief for appellees.

---

married. Code of 1857, p. 335, art. 23. By the *common law* curtesy before the wife's death as well as after her death, is liable for the husband's debts. 1 Wash. on Real Estate, p. 141, sec. 51. By the *statute* her land shall not be subject or liable for his debts or incumbered by lien. Code of 1857, p. 335, art. 23. By the *common law* the husband during the wife's life, may sell his estate by curtesy, and deliver possession of the property to his vendee. 1 Wash. on R. E., p. 137, sec. 31. By the *statute* he can neither sell, convey, mortgage, or in any manner incumber the property without the wife's consent. Code 1857, art. 23. By the *common law* the husband alone is entitled to the rents and profits during coverture, and if rents are due when the husband dies, they go to his administrator and not to the wife. 1 Wash. on R. E., p. 276, sec. 2. By the *statute* they enure to the wife as her separate property, and are not liable for the husband's debts, and if he buys property with them in his own name, he holds it as trustee for the wife. Code of 1857, p. 36, sec. 24. The common law gave everything to the husband but the fee. The statute reserves the use and fee to the wife. The reserved curtesy is personal to the husband for the benefit of himself and children, and beyond the use of it for himself and children the husband has no more power over the *estate* than he had before the death of the wife.

2. That curtesy at common law was an estate of *inheritance* and not by *purchase*. "It is part of the inheritance and is not by purchase; a part of the wife's estate continuing the inheritance to the children through the father as an intermediate for the family benefits. Hence the common law necessity for the husband and wife's joint seizin during coverture, for without which he could not enter under her estate." 1 Wash. on Real Estate, 140, sec. 44, p. 141, sec. 50; 2 Crab on Real Property, 119; 2 S. & M., ch. 249; 1 Roper on H. & W., 85; 2 Atk., 247; 1 Wash on R. E., p. 159, secs. 23 and 30, p. 501, sec. 61; 13 Conn., 33; 3 Atk., 697. The rule as to what constitutes seizin has been relaxed. 9 B. Monroe, 89; 13 ib., 467; 15 ib., 591; ib., (Ky.), 000; 8 Hill, 186; 5

## Brief for appellees.

Case, p. 98 (N. Y.); 23 Mo., 115; 25 ib., 349; 40 Miss., 163. These authorities decide that curtesy is *inheritance* and not *purchase*, and hence it follows that curtesy like any other inheritance can and will be defeated by a valid will, or the valid exercise of any other power to dispose of property. 1 Wash. on R. E., p. 128; sec. 2, p. 152, secs. 9 and 10, etc.; 1 Pr. Williams, 109; 5 Modd. R., 410; 7 Rb. Island, 383; 24 Barb., 581 (N. Y.); 9 Barb. (N. Y.), 360; 28 Barb. R., pp. 343, 378.

3. That the wife has the power to dispose of her separate property. The act of 1867, p. 725, declares "that a married woman may, without the consent of her husband, dispose of her separate estate by last will and testament."

4. That Ross, as executor, under the will of his wife, being in possession of the property, and conducting it for the purposes of the will and as executor, and in his name, as executor, having insured the dwelling house thereon for the benefit of the estate, the policy of insurance can not be subjected to the payment of Ross' debts as husband.

*G. L. Potter*, on same side :

The question presented for decision, arises under the woman's law of the Code of 1857, *as amended* by the act of 1867. The property of Mrs. Ross was acquired and her will was made under this amendment.

The Code act declared that nothing therein should "deprive the husband of his right of curtesy to the extent allowed by law;" but it expressly limited this right to lands of which the wife should "*die* seized or possessed." It gave to the wife the exclusive possession and use of her estate during the coverture, and left the interest of the husband contingent upon his survivorship and her dying seized. It seems a misnomer to call such a dependent interest, which can be a mere possibility during the coverture, a "right of curtesy." Doubtless the word "curtesy" was retained to indicate that this new right of the husband was further dependent, like the old right of curtesy, on the birth of issue capable of inheriting.

---

Brief for appellees.

---

The Code of 1857 not only gave to the wife the exclusive possession and usufruct, but it also enabled her to enter into a class of contracts without consent of her husband and without limit of amount, and these might be enforced by legal process, and her whole estate might be sold to pay them; and thus this alleged "vested estate" of the husband might be sold away, under process upon the separate contracts of the wife. It is impossible to imagine a thing more unlike the old common law curtesy interest of the husband, than is this contingent privilege of survivorship secured to him by the Code of 1857.

But by that Code the wife could not directly convey her lands except by joint deed of herself and husband. To this extent, he might protect his contingent right of survivorship by refusing to join her in a conveyance of her estate; but the act of 1867 *enlarged* her power of disposal, and gave her the right to "dispose of her separate estate by last will and testament, without the consent of her husband." These last words clearly indicate that in thus devising her estate, the wife is to act as a *feme sole*; and they further show the intent to subject to such will of the wife, any contingent interest the husband may have in her estate.

Under a similar statute of New York, pamphlet acts, 1849, p. 528, it was held that the power given to the wife to convey or devise her separate estate would, if exerted as allowed by the statute, exclude all claim of the husband. *Ransom v. Nichols*, 22 N. Y., 111-12; *Hurd v. Cass*, 9 Barb., 368-70; *Sleight v. Read*, 18 Barb., 164. The court likened it to the case of a trust estate held for the use of the wife, with a power in her to dispose of the same by her *appointment*. If she makes no appointment, the surviving husband takes his curtesy; but if she exercises the power, he is excluded. *Clark v. Clark*, 24 Barb., 582.

It has been urged that under the Code of 1857, the husband had, during the marriage, a vested interest—a right of property to be enjoyed in future, and contingent only upon his survivorship. If this was true, the law of this case would still be with

---

Brief for appellees.

---

the appellees, for the act of 1867 interposes another contingency; the wife must not only die seized, but she must also die *intestate* as to the estate, or the husband is excluded. But under that code, the husband could have no such vested estate during the coverture. If such an interest existed then, like all such vested rights, it might be conveyed by the husband, and it might be subjected to pay his debts; but the Code of 1857 expressly forbade this; p. 335, § 23. As we have shown, this so-called "vested right" of the husband might also be divested upon the simple contracts of the wife. The law knows of no such mode of divesting a vested estate by the act of a third party. The fact that, in the matter of her separate estate, the wife might so contract against the will of her husband, as to cause the entire destruction of her estate, gave significance to the provision which restricted the claim of the husband to cases where the wife should "die seized or possessed."

By the common law, the husband, immediately upon the marriage, had a joint seizin with the wife of all lands of which she was seized in fee, and he was entitled to the rents and profits during the marriage, but this right was so far inchoate, before birth of issue capable to inherit, that it was liable to be defeated by her act forfeiting the inheritance, such as treason. 1 Washb. Real Prop., 312-13 (276); *Pender v. Dicken*, 27 Miss., 255.

The interest of the husband as tenant by the curtesy *initiate* in the lands of his wife, was "a freehold estate," and might be sold under execution. *Day v. Cochran*, 24 Miss., 273-4. But all this was changed by the Code of 1857, whereby the interest of the husband, like the dower interest of the wife, became *contingent*—dependent both upon survivorship and the dying seized, by the husband or wife, as the case might be.

Being thus contingent, and not vested, a change in the law during the coverture would defeat the claim of husband as well as wife. *Magee v. Young*, 40 Miss., 164.

Under the New York law before referred to, the wife had, during the coverture, both the exclusive possession and the separate

---

Opinion of the court.

---

usufruct of her estate, and therefore it was held to be legally impossible for the husband to acquire an estate by curtesy in it. The logic of the decision is conclusive against any like pretense in this case. *Billings v. Baker*, 23 Barb., 347-50; *ib.*, 365-70.

There being nothing "vested" in the husband during coverture, it is vain to talk about "carving" an imaginary estate, as was attempted in *Knott v. Lyon*.

It is vain to urge that the act of 1867 does not extend to the contingent claim of the husband. It empowers the wife to "dispose of her *separate estate*"—meaning *the whole* estate. The Code of 1857 employs the words, "separate property," "separate estate," interchangeably to describe the whole estate of the wife. p. 335-36, §§ 23-4-5.

It is also vain to insist that the claim of the husband attached upon the estate at the instant the wife died, and that therefore her will is inoperative. That sort of logic, if allowed, would defeat all devisees.

SIMRALL, J., delivered the opinion of the court.

So much of the original bill as sought a cancellation of the conveyances which vested the property in Mrs. Ross has been abandoned, and the controversy on the part of the appellants, judgment creditors of W. E. Ross, is limited to an effort to establish a life estate in him to the land as tenant by the curtesy, and to subject that to their judgments.

The novel and important question has been ably argued by counsel, whether, under existing statutes, W. E. Ross took an estate by curtesy in the lands?

Mrs. Ross acquired the lands, by purchase and conveyance, in 1870. She died in 1871, having made a last will and testament, by which she devised the lands to her children, issue of her marriage with W. E. Ross. The husband was made executor, and entrusted with the control of the property, and the use of its revenues for the support and education of the children, and the maintenance of himself during life.

---

Opinion of the court.

---

There was marriage, seizin by the wife of a freehold of inheritance, birth of issue capable of inheriting, and survivorship by the husband. So that there was a concurrence of all the common law incidents to make this estate complete and consummate. Marriage conferred upon the husband the right to the rents, issues and profits of his wife's real estate during the coverture. He became seized *jure uxoris* with her of her freehold estates, with the possession and pernaney of the issues and profits.

The birth of issue, capable of inheriting, advanced the husband's rights still further, and enlarged his title into a life estate, which initiates from that moment, and becomes a vested estate, capable of being alienated, or subjected to his debts. There is not a feature of contingency about it. It begins or becomes initiate on the birth of issue, and continues so long as the husband lives. It is well settled in the law, that from the time this life estate vests, it becomes inseparable from the inheritance, and cannot be restrained or prevented by the act of the wife or any other person. Greenleaf Cruse, title, Curtesy, 153, § 17; Paine's Case, 8 Rep., 34; 1 Hill on Real Estate, 79, 322. In this particular, it is like dower. By marriage and seizin of the husband, the right became fixed in the wife, and could not be cut off or defeated by any act of the husband. Neither can the wife, when curtesy is vested by marriage, seizin and birth of issue destroy the husband's estate. The birth of the issue, at any time during the coverture, constitutes the husband tenant by the curtesy, and is such title as he may stand upon in the action of ejectment. Jackson v. Johnson, 5 Cow., 95. In Ellsworth v. Cook, 8 Paige, 613, the application was to subject this estate to the husband's debts; it was held that this initiate estate continued during the whole period of his life, if he survived his wife, and could be reached by creditors. The interest of the wife must be such, that the husband may have seizin in her right. Bacon Ari., title, Curtesy. If there be an outstanding particular freehold estate, which does not fall into the inheritance during coverture, there is

---

Opinion of the court.

---

not such a seizin and right of immediate possession as will support the estate of curtesy. *Redus v. Hayden*, 43 Miss., 633-6; *Malone v. McLaurin*, 40 Miss., 162. The seizin must be accompanied with possession, or the right of immediate possession, and such entry could be made by the voluntary act of husband. *Ib.* Tenant, by the curtesy initiate, is seized of a freehold estate in his own right, and the interest of his wife is a mere reversionary interest, depending on the life estate of the husband. *Foster v. Marshall*, 2 Fos., N. H., 491, 493; *Matlock v. Stearns*, 9 Vt., 327, 335. Marriage gives to the husband a freehold interest during the joint lives of himself and wife, and husband and wife are seized in right of the wife. *Co. Litt.*, 67 a; *ib.*, 351.

Let us now turn to the statutes in force at the time Mrs. Ross acquired the property and made her will, and see what alterations have been made in the common law, and how the rights of parties have been affected thereby.

These statutes, declaring the property rights and powers of married women, were designed as far as they go, to emancipate the wife from marital disability, and confer upon her *legal* rights, capacities and powers. Hence, they confer the capacity to acquire and hold legal estates, to bind and make them liable by *legal* contracts. The character of their estates, and the extent of the innovation upon the common law will be more clearly discerned by a reference to the statutes themselves:

"Every species and description of property, whether real or personal \* \* \* which may be owned by or belong to any single woman, shall continue to be the separate property of such woman as fully after marriage as it was before." The same character is impressed upon after acquired property, with a complete right to acquire it. Such property shall not be liable to the debts of the husband, nor shall it be sold, conveyed or in any manner incumbered by the husband unless the wife join in the conveyance. Art. 32, pp. 335, 6, Code, 1857. The rents and income shall inure to the wife as separate property, and shall not



---

Opinion of the court.

---

be liable for the husband's debts. She may invest her means in purchasing property ; and should the husband use her money to buy in his own name, he is declared to be her trustee. Art. 24. She may rent her lands, and make any contract for the use thereof. Her property is liable for all the debts she may incur, under the 25th art., including her ante nuptial contracts, and satisfaction may be had out of it. The husband is not liable for her ante nuptial debts, nor for her debts after marriage if she hold separate property under the act.

The 28th article is, "if the married woman shall die seized or possessed of real estate acquired or held under this act, nothing herein contained shall deprive the husband of his right of curtesy to the extent allowed by law."

It admits of most grave and serious doubt, whether, aside from the 28th article, the curtesy estate had not been entirely abolished by the anterior provisions of the statute ; abolished not by express words, but by conferring such powers and rights, as incidents of the wife's tenure of her real estate, as entirely swept away the essential foundations upon which this estate rested. The estate arises by operation of law out of the circumstances, and upon the conditions already named. Under the statute the husband has no seizin, *jure uxoris*, or jointly with her. He cannot receive or appropriate the rents ; he cannot make a lease ; he has no possession *sui juris*. Neither the land itself, nor its income, can be taken by creditors. But, on the contrary, he or his representatives may be called to an account by the wife or her representatives, for the rents, profits and income of her separate property. (Art. 28, last clause.)

The birth of issue in no wise affects the wife's estate, or advances the husband's rights. The statute strips him of every interest, present and prospective, which marriage gave him at the common law. But her real estate shall not be subject to his debts, but satisfaction may be had out of her real estate for her debts incurred before and after the marriage. The land may be

---

Opinion of the court.

---

sold under legal process, and thus destroy the initiate estate, which, it is said, is vested in the husband.

The 28th section must be so construed as to bring all the several parts of the statute into a harmonious system, and thereby to carry out the plan and purposes of the legislation.

The central idea in the scheme is, that the husband shall not take and enjoy the real estate of the wife, nor its rents, as allowed by the common law, nor shall marriage give him her personal property. Since he has been deprived of these marital rights, he shall not be responsible for her debts contracted before or after marriage. Though the wife may take the income and make leases, yet she shall not sell and convey or mortgage without the husband's consent.

The 28th section is careful in the use of language. It is, "if the wife shall die seized or possessed of lands," etc. It confines the husband's curtesy to the lands of which the wife *died seized*. If they have been conveyed away by deed of husband and wife; if they have been sold under legal process for the wife's debts, then the right of the husband does not arise.

To put the legislative intent in the abstract, it might be thus expressed. If the real estate has not been disposed of in any mode allowed by law, then the husband shall have curtesy. That thought is embraced in the words, "*died seized or possessed*."

By the act of 19th February, 1867, the legislature took another step towards the enlargement of the capacities of married women. Its title is, "To amend the law, heretofore in force, respecting the property rights of women." The first section is, "that hereafter a married woman may, without the consent of her husband, dispose of her separate estate by last will and testament \* \* \* unless the contract of marriage entered into before or at the time of marriage, or by the terms of the conveyance, devise or bequests under which she acquires and holds the same, the power so to dispose of her separate estate shall be expressly, or by plain implication, excluded." The language conferring the power is

---

Opinion of the court.

---

broad, general and absolute, subject to a restriction which would apply, without being named, equally to persons not under disability.

The intent is plain, since the wife already has the power to possess, control and enjoy her property during coverture exclusively, may charge it with debt, and with the consent of the husband, sell or incumber it. She shall have the additional power and discretion to dispose of it by will; nor shall there be any restriction upon the right unless imposed by the instrument under which she holds.

We would interpret the statute as conferring the capacity to alienate by devise, and as enabling her by will to change the destination which the real estate, of which she died seized or possessed, would otherwise have. Construing all the statutes of *pari materia*, together, so that each several provision may have effect, the 28th art. of the statute of 1857, as modified by the act of 1867, retains to the husband a curtesy in the real estate of his wife, which has not been alienated by their joint conveyance, which has not been sold by creditors of the wife under legal process, which have not been devised by the wife. This construction would leave the husband's right to take effect on all the lands of which the wife "died seized," and would fully satisfy the words of the law. At the same time it would subserve what would seem to be the manifest intent of the law maker. There is close analogy between the dower and curtesy estates, as regulated by statute. Dower is confined to real property, of which the husband died "seized and possessed," and to lands not conveyed for a valuable consideration and in good faith, by the husband, without the wife's relinquishment. At common law, the right to dower became initiate on the seizin of the husband, and could not be divested by any act done or suffered by him. By statute it is limited to lands whereof the husband had seizin at his death, and to those alienated without valuable consideration. The husband may cut off the contingent right by such alienation. The statute

---

Opinion of the court.

---

makes dower contingent, so does it the estate by the curtesy. The husband is enabled to alienate, for value, and defeat dower. The wife may charge her separate estate with debts, and thus indirectly make creditors to cut off curtesy; so she may devise it and thereby defeat it.

As we interpret the statutes, the right of the husband does not become initiate of a life estate on the birth of issue, in the sense of being fixed and vested, but it is contingent to take effect on the death of the wife in all the lands of which she died seized or possessed, that is, not disposed of during coverture, and not devised by will.

This view is supported by the analogies of the law. An estate conveyed in trust, to permit the wife to receive and enjoy the rents and issues, with a power of disposition of the property by will, is such an equitable estate, as that the curtesy of the husband may attach, if the wife dies without making an appointment. But if she makes a will, the husband shall not have curtesy. *Morgan v. Morgan*, 4 Gill & J., 395. But if the intention is clearly manifested that he shall be excluded from the curtesy, he shall not take. *Bennet v. Davis*, 2 P. Wm., 316. See also *Follett v. Tyrer*, 14 Sim., 125. The mere fact that the wife shall have exclusively the income of an equitable estate of inheritance does not exclude the husband from curtesy.

If the instrument which creates the equitable estate, in the wife, gives her the power of appointment by deed or last will, and she executes the power, the husband's right is cut off. If she does not, it attaches. This doctrine, well supported by authority in courts of equity, is in effect, the result attained by the statutes. It was said by the court in *Bank of La. v. Williams*, 46 Miss., 632, "that a married woman (unless the instrument creating her estate otherwise provides) holds her property, whether owned at her marriage or acquired since, as if the 23d, 24th, 25th, 26th and 27th articles of the Code, pp. 335-6 were embodied in the instrument conferring the property upon her." The statute impresses itself

---

Opinion of the court.

---

as conditions of her tenure; defies the terms by which she holds, and her power over the property. If land be conveyed to a married woman in 1870, we must consult the law then in force, to determine the extent of her power to charge, and dispose of it. If at that time and at the date of the death of Mrs Ross, in 1871, the statute declared that she might at her discretion without her husband's consent, devise her land, then that power was annexed to her title and estate, quite as completely as if it had been conferred by the deed under which she acquired it. If she exerted the power in such wise, as to create an interest in her devisee, incompatible with a curtesy in the husband, that estate never arose. The absolute power of disposition conferred by the statute of 1867, is inconsistent with a vested initiate tenancy by the curtesy. That estate, under these statutes, has lost its vested feature on the birth of issue, and becomes contingent, on the event of the wife's dying intestate, without having the seizin and title pass from her in her lifetime, and without disposition by last will.

These views are in the main sustained by the case of *Billings v. Baker*, 28 Barb., 344-376. The third section of the New York statute of 1849 is like ours, except that it confers upon the married woman power to "convey" as well as devise, and does not in express words retain the curtesy estate. It was held, that the effect of the statute was to abolish that estate altogether. The 28th article of the Code of 1857 still preserves it, contingently, however, as we have seen.

The case in 28 Barb. went further than the prior adjudications, in holding that the statute abolished curtesy, although the wife had not made a "conveyance" or "devise." It was well settled that if she did "convey" or "devise," curtesy was cut off. *Hurd v. Cass*, 9 Barb., 366; *Clark v. Clark*, 24 Barb., 582-3. Our statute allows curtesy if the wife has not made a "devise" or her seizin has not otherwise been lost, by some voluntary act, or act suffered by her, so that she did not die seized of the property.

It follows that W. E. Ross is not tenant by the curtesy.

The decree of the chancery court is affirmed.

---

Statement of the case.

---

## VICTOR F. ERWIN v. JOHN HEATH.

1. **ATTACHMENT — GARNISHMENT.** — It is well settled that judgment cannot be rendered against the garnishee until after the recovery of judgment against the defendant in the attachment.
2. **SAME — PROCEEDINGS AGAINST A GARNISHEE.** — A proceeding against a garnishee, in one aspect, is an original action. In another, it is a means for procuring satisfaction of the recovery against the chief defendant. It is a dependency of the attachment. Hence, the garnishee cannot object to mere irregularities and errors in the judgment against the defendant in attachment. Nor can he assign such for error in this court, unless the objection be so vital as to render the judgment against the defendant invalid and void.
3. **SAME — SAME — NOTICE.** — An attachment suit, under the statute, may be the blending of two processes, the one strictly *in rem*, the other *in personam*. The former consists in the levy of the writ upon the property of the debtor or the sequestration of the effects of a debtor or a debt due to him, by service of garnishment process. If the defendant is served personally with notice of the suit, it then assumes the form of a personal action. One of these may succeed; the other fail.
4. **CASE IN JUDGMENT.** — Judgment final was rendered against E., as garnishee, for want of an answer. There were no irregularities in this proceeding, but the clerk failed to mail notice of the suit to T., the defendant in attachment: *Held*, that this did not render the judgment against T. void, but voidable only, and that E., the garnishee of T., cannot assign for error in this court, errors and irregularities in the judgment against T., the original defendant in the attachment.

ERROR to the Circuit Court of Washington County. Hon. C. C. SHACKELFORD, Judge.

Erwin, the plaintiff in error, was a garnishee, against whom a judgment by default was rendered for \$475, at the November term, 1872, of the Washington county circuit court, in a suit by attachment, wherein John Heath was plaintiff and E. P. Tyree was defendant.

Heath sued out an attachment against Tyree to the July term, 1871, of said court, on the ground that Tyree had removed himself out of the state. The attachment was served on Erwin,

---

Statement of case.

---

plaintiff in error, and Denson, as garnishees ; no service on Tyree, the defendant ; writ returned as to him "not found," and no property found.

On the 6th May, 1872, being the first day of the May special term, Heath, by his attorneys, filed his declaration *in debt*, in which he stated his cause of action thus: "For, that on the day and year last aforesaid, the said defendant was greatly indebted to the said plaintiff in the sum of four hundred and twenty-five 50-100 dollars, amount of taxes paid by plaintiff for the said defendant on the "Warren plantation," in the county and state aforesaid, as by annexed account, and being so indebted, said defendant undertook and promised to pay," etc. R., p. 5.

Afterwards, during the same term of court, to wit: May, 1872, an order was made in this cause, and entered on the minutes in these words: "order of publication and continued."

On the 17th September, 1872, plaintiff below filed his affidavit for publication with the clerk, stating that defendant in attachment, Tyree, resided at Gallatin, Tenn., also the issuance, execution and return of the attachment.

On the 18th November, 1872, proof of publication was filed, showing that publication had been made once a week from 21st September, 1872, to 19th October, 1872, both inclusive, of an order of publication, of which a copy was attached: this order, as appears by the copy, was in the usual form, reciting the issuance of the attachment, its execution and return, the residence of Tyree, and requiring his appearance to be entered at the November term, 1872, to plead, answer or demur to said action, and requiring a copy of the order to be published, and the clerk of the court to transmit a copy of same to Tyree, at Gallatin, by mail, postage prepaid.

No original order of publication appears in the record, and no proof that a copy was mailed to Tyree as required. The record shows only the copy of the order attached to the printer's affidavit.

At the November term, 1872, on the 23d November, judg-

---

Briefs.

---

ment by default was entered against Tyree, the defendant in attachment, and also against Victor F. Erwin, plaintiff in error, and John Denson, as garnishees of Tyree, for \$475 and costs.

Upon this judgment, execution issued on the 23d May, 1873, against Erwin and Denson, the garnishees, which was levied on Erwin's lands, and proceedings then stayed by order of Heath's attorneys on 16th June, 1873. Afterwards, on 30th October, 1873, Heath filed a refunding bond, and on the 1st day of November, 1873, an *alias* execution issued against Tyree, Denson and Erwin, whereupon Erwin, the plaintiff in error, gave his *supersedeas* bond and sued out this writ of error to have the judgment against himself reviewed and reversed.

*F. & L. B. Valliant*, for plaintiff in error contended, that the judgment against the plaintiff in error, as garnishee, is void, because it is based on a void judgment against the original defendant in attachment, he having no notice of the suit. There must be a valid judgment against the defendant in attachment to support a judgment against the garnishee. *Edwards v. Toomer*, 14 S. & M., 649; *Marcy v. Roberts*, 5 Cushman, 225; *Melius et al. v. Houston*, 41 Miss., 59; *Ford v. Woodward*, 2 S. & M. Miss., 260; *Calhoun et al. v. Ware*, 34 Miss., 146; *Moore v. Williams*, 44 Miss., 61; *Patrick v. Dillard*, 44 Miss., 384.

*W. L. Nugent*, for defendant in error :

This is a case in which the garnishee seeks to avoid the payment of a judgment against him, on the ground that the judgment against the attachment debtor is *void*. Tyree was sued as a nonresident debtor and Erwin sued as a garnishee. The record shows that notice was published according to the Code, 1857, p. 378, art. 19. The failure of the clerk to mail copy of the notice, if it was not done, does not render the judgment void, but only *voidable*, and that at the suit of Tyree. The judgment is good until reversed as this court has decided. *Crizer v. Gorren*, 41 Miss., 564. The garnishee has no right to attack or impugn it. *Moore v. Coats*, 43 Miss., 226; *Frank v. Appesar & Co.*, MSS. opinion; *Crizer v. Gorren*, *supra*.



---

Opinion of the court.

---

All the presumptions of law are in its favor, and the judgment of the court below was rendered against the garnishee by default. He did not object then and cannot now complain.

SIMRALL, J., delivered the opinion of the court:

This writ of error is prosecuted by Erwin, to revive a judgment rendered against him, as garnishee, on the suggestion that he was indebted to E. P. Tyree, defendant in the attachment suit brought by Heath.

Judgment final was rendered against Erwin for want of an answer. No irregularity has been pointed out in the proceedings against Erwin. But the assignment of errors impugns the regularity and validity of the judgment against Tyree, the debtor of the plaintiff Heath.

It is well settled, that judgment cannot be rendered against the garnishee until after the recovery of judgment against defendant in the attachment. *Roberts v. Barry*, 42 Miss., 260. *Mandel v. McLure*, 14 S. & M., 11.

The summons against the garnishee is original process, in so far as it seeks to establish an indebtedness from him to the defendant in the attachment suit, and to condemn that indebtedness to satisfy the plaintiff's demand. It is indifferent to the garnishee whether he pays the plaintiff or his original creditor, the defendant. He occupies the relation between the parties of a stakeholder or trustee. It is a duty, therefore, which he owes his creditor, as well as a proper regard for his own safety, that he should see that the law is pursued. *Ford v. Hurd*, 4 S. & M., 684.

Whilst the proceeding against the garnishee is a collateral suit, in one aspect of it an original action, in another it is a means for procuring satisfaction of the recovery against the chief defendant, it is a dependency of the attachment, and, in that view, it is incumbent on the garnishee that he should observe the condition of that suit, and protest against judgment against himself, unless the plaintiff has put his demand against his debtor in the form of

---

Opinion of the court.

---

a valid judgment. He may not object to mere irregularities and errors that may occur. If the defendant acquiesces, he cannot complain. The garnishee cannot assign, in this court, for error, irregularities in the judgment against Tyree, which would be sufficient, at the suit of Tyree, to reverse it, unless the objection to that judgment be so vital as to render it invalid and void. *Matheny v. Galloway*, 12 S. & M., 477; *Whitehead v. Henderson*, 4 ib., 704; *Ford v. Hurd*, ib., 683.

Was, then, the judgment against Tyree voidable merely upon writ of error, or was it of no effect and void? The law requires that notice shall be published for four weeks in a newspaper, warning the defendant in attachment of the pendency of the suit; and, also, that a copy of the notice shall be inclosed, postage paid, and put in the mail, addressed to the defendant's post office, if the creditor, his agent or attorney, has indicated the post office by affidavit. Code of 1871, §§ 1472-1475; *Patrick v. Dillard*, 44 Miss., 385; *Moore v. Williams*, ib., 63.

The transcript certified by the clerk to be "full and complete," contains what purports to be the usual order of publication, and also the proof of its actual insertion in the newspaper, as required by law. It does not, however, contain the affidavit of the clerk, as required by art. § 1475, that he forwarded a copy of the notice to the post office of Tyree.

A paper, separate from the transcript purporting to be a statement in short of the several steps taken in the cause, certified to be a copy of the entries, as the same appear on the primitive docket of the clerk, is also on file. It would seem that this docket was kept by the clerk, as a mere remembrance, to aid him in making up the formal record of causes.

It can not control the transcript certified to us as "containing a full, true and perfect copy of the record of the proceedings and judgment, \* \* \* as fully as the same appears of record," etc. The clerk is directed by law to transcribe the papers and proceedings in a suit, in the final record book, and from that transcripts

---

Opinion of the court.

---

are made which import verity. *Mandeville v. Stockett*, 28 Miss., 408.

The affidavit on which the order of publication is predicated, may be filed in court, or with the clerk; and the latter in vacation may make the order of publication. Code 1871, §§ 1472, 1473. In this case the affidavit was made before the clerk on the 17th of Sept., and the judgment rendered at the ensuing November term.

The 1475th section makes it the duty of the clerk to forward a copy of the notice to the defendant's post office, by mail, and he shall make affidavit of the fact and file it with the papers in the cause. The record does not show that this was done.

Is the judgment against the principal defendant void or voidable for that reason? The cases in our books are not harmonious. In *Edwards et al. v. Toomer et al.*, 14 S. & M., 77, there "was no other service of process, nor anything equivalent to it, except such as was implied in the service of the attachment;" the point ruled was, "that without service on the defendant, or publication of notice, or without appearance, no valid judgment can be rendered. Consequently "the judgment of Toomer, Gay & Co. was void, for the want of notice to or appearance by the defendant King."

In *Ridley v. Ridley*, 24 Miss. Rep., 655. The notice was published for four weeks in a newspaper in this state, and the precise question was whether the 15th section of the code (Hut.), p. 404, in reference to publication in some newspaper where the defendant was supposed to reside, was mandatory; and if not complied with, what was its effect on the judgment. It was held that it was discretionary, and a failure to make such publication was not error.

In *Calhoun, Bull & Co. v. Ware*, 34 Miss., 146-7-8, it was held on the authority of the case last cited, that in cases of attachment against non-resident debtors, the giving of notice by publication, is not absolutely necessary to the judgment, \* \* the seizure

---

Opinion of the court.

---

of the attached property being notice in law to all parties having an interest, etc. The court carried the case of *Ridley v. Ridley*, (*supra*), further, perhaps, than the principle announced justified. Nothing more was before the court, than whether the publication of notice in the state where the defendant was supposed to reside, was imperatively required. (There was the requisite notice in the domestic paper). Such was supposed to be the scope of *Ridley v. Ridley* in *Moore v. Williams*, 44 Miss., 61.

But is not the principle stated in *Calhoun, Bull & Co. v. Ware* sound?

An attachment suit, under our statutes, is, or may be the blending of two processes, one strictly *in rem*, the other *in personam*. The former consists in the levy of the writ upon the property of the debtor, whereby it is made amenable to the disposition and judgment of the court, or it is the sequestration of the effects of the debtor, or of a debt due to him, by service of garnishment process. By that means the court obtains jurisdiction over the "*res*."

If the defendant is served personally with notice of the suit, it then assumes also the form of a personal action. One of these suits may come to a successful end, the other may fail. It was in this aspect of the subject, that we held in *Holman v. Fisher*, Ex'r, 49 Miss., 477, 8, 9, that although Rush, the defendant, died after appearance and plea, nevertheless the creditor could rightly prosecute his suit *in rem*, against the attached debt, and subject that to his demand; to do that it was necessary that judgment should be rendered against the defendant, to avail no further and to have no other effect than as a means to subject the debt of the garnishee to the plaintiff's demand. It was worthless as a personal judgment. No general execution could be issued for any balance unpaid after the debt of the garnishee had been applied and exhausted. It could not be the foundation of a *scire facias*, nor the support of an action of debt, in this or any other state. Its func-

## Syllabus.

tion, exclusively, is as part of the formula by which the specific thing is adjudged to be condemned to pay the plaintiff's debt.

If the writ is not levied upon property, nor a debt attached, the court cannot proceed in that suit, and it comes at once to an end. The jurisdiction depends upon the seizure of the property, or the debt, and that may be exerted upon the thing. The failure to pursue the formula of the statute as to publication of notice, or such informalities, does not make void the judgment as respects the property or debt. It may be alleged for error, and sufficient for reversal, but the judgment is not utterly invalid. *Cooper v. Reynolds*, 10 Wallace, 315.

Although it was erroneous to have rendered judgment against Tyree for the want of the requisite evidence of the mailing of the notice to him, we are disposed to accept the doctrine as stated in 34 Miss., 146, supported, as it is, by high authority elsewhere. The judgment against the defendant in attachment is not void for the reason alleged. Erwin, the garnishee and plaintiff in error, cannot assign those matters which are mere errors and irregularities in the proceedings against the principal defendant, as grounds for reversing the judgment against him.

Wherefore it is affirmed.

---

THOMAS S. HARDEE v. WM. H. GIBBS, Auditor, etc.

1. PLEADING AND PRACTICE—MANDAMUS.—The petition for the writ of *mandamus* is an *ex parte* application to the court, and constitutes no part of the pleadings. It should present a *prima facie* right on the part of the relator and of duty and obligation to perform the act demanded on the part of the defendant. It should be verified by affidavit, otherwise the alternate writ should not be granted. It should also appear that a demand had been made, and a refusal or neglect to comply.
2. SAME — RULE AT COMMON LAW.—At common law a writ of error would not lie to the judgment of an inferior court awarding or refusing an alternate *mandamus*, or in awarding or refusing a peremptory *mandamus*.

---

Briefs.

---

But the practice is otherwise in this country, and the awarding or refusing the writ is not a matter of mere discretion.

3. **SAME — RIGHT OF REVIVOR AGAINST OFFICER.**— A suit by or against an officer may be revived by or against the successor. Such is regarded as a proceeding against the officer, and not against an individual. The responsibility results from the office and not from any individual responsibility of the person occupying it. Such a rule is essential to the administration of justice.
4. **APPROVAL OF LAWS — POWER OF THE GOVERNOR— ACT OF APRIL 25, 1873.**  
— In the approval of laws the governor is a component part of the legislature, and unless the constitution allows further time, he must exercise his power of approval before the two houses adjourn, or it will be void. Our constitution makes no such provision; therefore the approval of the act of April 25, 1873, by the governor, after the adjournment of the legislature, is a nullity, and the act is void.

ERROR to the Circuit Court of 1st District of Hinds County.  
Hon. GEORGE F. BROWN, Judge.

The pleadings sufficiently appear in the opinion of the court.

*C. E. Hooker*, for plaintiff in error, insisted :

That the act of April 21st, 1873, which abolished the office of state engineer, was void and of no effect, because it was approved by the executive after the adjournment of the legislature. And that it can not be helped out by either of the silent modes of approval; that is, by retaining it in his possession for five days during the session, or failing to return it within the three first days of the next session. Cushing on the Law and Pr. of Leg. Bodies, sections 2374 and 2375; Cooley on Const. Lim., p. 153; Fowler v. Peirce, 2 Cal., 165; People v. Purdy, 2 Hill., 31.

*G. E. Harris*, Attorney General for the state, contended :

1. That this petition was filed against Musgrove, auditor, etc., and as there is no statute allowing a revivor against his successor in office, the petition should be dismissed. Secretary v. McGarahan, 9 Wall., 313; United States v. Boutwell, 17 Wall., 604.

2. That the governor has the right, under the constitution, to approve a bill at any time within five days after the adjournment of the legislature. People v. Bowen, 30 Barber, 26; Stinson v.

---

Opinion of the court.

---

Smith, County Treasurer, etc., 8 Minn., 369 ; Cooley on Const. Lim., 152, 155.

3. That whether the bill was approved or not after the adjournment of the legislature, it became a law on account of the failure of the executive to return it to the legislature within the three first days of the next session. Art. 4, sec. 24, Const. Miss.

PEYTON, C. J., delivered the opinion of the court :

On the 2d of December, 1873, Thomas S. Hardee filed his petition in the circuit court of Hinds county, for the first district of said county for the writ of *mandamus* against Henry Musgrove, as auditor of public accounts, commanding him to issue a warrant for \$200 dollars on the state treasurer, in favor of the said Thomas S. Hardee, or show cause why he does not issue it. The petition stated that as engineer of the state, he was legally entitled to the sum of two hundred dollars for one month's salary, from the 15th day of March to the 15th day of April, 1873, and that a warrant on the treasurer for that sum had been demanded of said auditor who refused to issue the same.

On this petition a summons was issued against the said Musgrove, which seems to have been regarded in the court below as in the nature of an alternative *mandamus*, to which said auditor appeared, and for return thereto said, that said office of state engineer was abolished by an act of the legislature on the 21st day of April, 1873, and that therefore the relator had no right to the warrant demanded. Whereupon the relator moved the court for a peremptory *mandamus*, which was refused by the court. And hence the case comes to this court by writ of error.

Since the decision of this cause in the court below, the term of office of said Henry Musgrove as auditor of public accounts having expired, a writ of *scire facias* has been served on W. H. Gibbs, his successor in office to revive the cause against him.

The proceedings are somewhat informal. The petition for the writ of *mandamus*, which is an *ex parte* application to the court,

---

Opinion of the court.

---

and constitutes no part of the pleadings, should present to the court a *prima facie* case of right on the part of the relator to the right claimed, and of duty on the part of the defendant to perform the act demanded, and an obligation to perform it, and should be verified by affidavit, otherwise the alternative writ will not be granted. It should also appear from the petition, that a demand had been made on the defendant to do the thing he is sought to be compelled to do, and that he refused or neglected to do it; and the facts and circumstances under which the relator claims relief should be stated fully, clearly and unreservedly, and not inferentially; and it should also be shown that the defendant has it in his power to perform. When a *prima facie* case is thus made in the petition, instead of an ordinary summons, an alternative writ of *mandamus* is awarded by the court, which is in the nature of a declaration, and is the first pleading in the cause, commanding the respondent forthwith to do the act required, or to show cause why it should not be done. At common law, a writ of error would not lie to the judgment of an inferior court, awarding or refusing an alternative *mandamus* upon an application for it, or in awarding or refusing a peremptory *mandamus* upon the return to the alternative writ. But in this country the practice is otherwise. The granting or refusing of it is not a matter of mere discretion in the court, and whenever a suitor is entitled to a right which is withheld from him by the decision of the court, it can scarcely be said to be a matter of discretion which is understood to be the action of the court on such matters as are not demandable of right, but are accorded to the parties to advance the justice of the case. *Etheridge v. Hall*, 7 Porter, 47; and *Ex parte Morris*, 11 Grattan, 292; High on Extraordinary Legal Remedies, 365, sec. 512.

After the granting of the writ, three courses are open to the respondent: First, he may do the thing required; second, he may demur; and third, he may make return. If he chooses to demur, and the demurrer is sustained, the application is, of course, at an



---

Opinion of the court.

---

end. If, however, his demurrer is overruled, the respondent must then make return, denying the allegations of the writ, or setting up new matter constituting a defense to the relator's claim. This is the usual practice in this country, and is believed to be the most simple and correct. *Moses on Mandamus*, 204; and *High on Extraordinary Legal Remedies*, 361.

With respect to the right of the plaintiff in error to revive this suit by *scire facias* against W. H. Gibbs, as successor in office of Henry Musgrove, we entertain no doubt. This question was settled by this court in the case of *E. N. Duff et al. v. D. C. Beauchamp*, at the last term. In that case, it was said the auditor of public accounts, treasurer and secretary of state, exert a portion of the public authority in discharging official duties imposed by law, and any suit commenced by or against either of them, may be revived by or against his successor in office. And in support of this view of the law, the case of *Bushnell v. Gates*, 22 Wis., 202, is cited, in which a suit instituted against a public officer was revived and continued against his successor in office, for the reason that it was to be regarded as a proceeding against the officer and not against an individual. The responsibility results from the office, and not from any individual responsibility of the person who happens to occupy it. Such a rule is essential to the administration of justice, in view of the changes that are so frequently occurring in office.

In the case of *Lindsey v. The Auditor*, 3 Bush., 235, the auditor had resigned his office, and his successor was qualified. This presented, say the court, no defense in bar or abatement, the induction of the new officer should have been suggested, and the suit have been prosecuted against him. To the same effect are the cases of *Maddox v. Graham and Knox*, 2 Metcalf, Ky., 71, and *Clarke v. McKenzie*, 7 Bush., 523. In all such cases, whether as plaintiff or defendant, the officer represents the public interest, and is sought to be compelled to perform an official duty imposed by law upon the incumbent.

---

Opinion of the court.

---

We come now to the consideration of the question involving the validity of the act of the legislature of the 21st of April, 1873. It is conceded by both parties, that the legislature adjourned *sine die* on the 19th day of April, 1873, and that the governor of the state signed the bill two days after the termination of that session of the legislature. Has the governor the constitutional right to do so? By reference to the 24th section of article 4 of the constitution, it will be seen that an act passed by both houses may become a law only in three ways during the session of the legislature: 1. By the signature of the governor. 2. By the passage of the act by a vote of two-thirds of both houses over the veto of the governor. 3. By the failure of the governor to return the bill within five days, during the session (Sundays excepted), after it has been presented to him. The act under consideration did not take effect in either of these modes during the session of the legislature.

After the legislature has adjourned, there is only one mode by which an act passed by both houses of the legislature may become a law by force of the constitution, and that is where the governor receives the bill within five days next preceding the adjournment of the legislature, and does not return it with his signature or with his veto during the session, it shall be a law, unless sent back within three days after the next meeting of the legislature. And if it has become a law, it must be by virtue of the governor's signature to the bill two days after the adjournment of the legislature. The participation of the governor in the legislation of the state is similar to that of the president of the United States in the legislation of congress. With reference to the part taken by the latter in the legislation of the congress of the United States, Professor Pomeroy, an able expounder of constitutional law, says: "Although the constitution, in its general language, vests the legislative power in a congress which is declared to consist of a senate and house of representatives, yet a reference to other portions of the organic law shows that this congress does not, in fact,

---

Opinion of the court.

---

possess the sole legislative function. No law can be passed without the consent of the executive, unless two-thirds of both houses shall finally concur therein. The assent of the president is as necessary to the enactment of any measure, of the nature of law, as that of a majority of both branches of congress. *In this the president legislates.* His affirmative or negative decision is a step in the process of creating and not of executing laws. By virtue of the various provisions of the constitution, the congress is, in fact, though not formally and in terms, composed of three distinct bodies, president, senate, and house of representatives, and all must concur, with the single exception just noticed, that a two-thirds vote of both the other branches avails against the dissent of the executive. But the legislative function of the president is in every way inferior to that held by the senate and by the house of representatives. This inferiority consists, first, in the fact that his negative vote may be overruled by two-thirds of the congress, or in other words, that a majority of two-thirds practically dispenses with his concurrence; and secondly, in the fact that the president cannot originate any legislative measure." Pomeroy's Constitutional Law, 111, secs. 174 and 175.

Our constitution, like that of the United States in this respect, requires that every bill which has passed both houses shall be presented to the governor of the state. If he approves he shall sign it, but if he does not approve, he shall return it, with his objections, to the house in which it originated, who shall enter the objections at large upon their journal, and proceed to reconsider it, and if it be approved by two-thirds of both houses, it shall become a law. Hence it will clearly appear that the *active* participation of the governor in legislation is manifested by his signing the bill.

And as it is insisted on the part of the defendant in error, that the act in question became a law by virtue of the governor's signature, the other modes by which an act may become a law by the negative or nonaction of the governor, are not involved in

---

Opinion of the court.

---

the consideration of this case; our inquiry, therefore, will be limited to the investigation of the question, whether the act became a law by virtue of the signature of the governor thereto, after the termination of the session by a final adjournment of the legislature?

Judge Cooley, in his invaluable work on Constitutional Limitations, 152, says: "It has been held that, in the approval of laws, the governor is a component part of the legislature, and unless the constitution allows further time for the purpose, he must exercise his power of approval before the two houses adjourn, or his act will be void." He further says: "The power of the governor, as a branch of the legislative department, is almost exclusively confined to the approval of bills." Cooley on Con. Lim., 155.

If, as is laid down by Pomeroy in analogy to the president, and by Cooley, the governor, in approving bills, is a component part of the legislature, his signing a bill is a legislative act, which Cooley says, must be performed before the two houses adjourn or it will be void. The governor, as a branch of the legislature, can do no legislative act after the adjournment of the legislature. He has no more power to legislate in vacation than either house of the legislature. If, as Pomeroy says, the president legislates in signing an act of congress, the same may be said with equal propriety of the act of the governor in signing an act of the legislature. It would be equally a legislative act and can be performed only during the session of the legislature. The governor can do no legislative act nor perform any legislative function after the final adjournment of the legislature. Hence we conclude that the act of the governor, in signing the act in question, is an act *ultra vires*, and is therefore void.

The court below erred in refusing the peremptory mandamus asked for on the part of the plaintiff in error.

The judgment is reversed and the cause remanded.



# INDEX.

---

**ABANDONMENT.** See OFFICE AND OFFICER, 7.

## ACCORD AND SATISFACTION.

1. If the creditor compounds with the debtor and agrees to take less than the whole debt, and accepts the bond or promissory note of his creditor with security, or the note of a third person; here the new and additional security makes the consideration for a relinquishment of the excess, and the accord and satisfaction are complete. *Pulliams v. Taylor*, 251
2. **SAME—CASE IN JUDGMENT.**—Where P. was indebted to T. in the sum of \$3,400, and it was agreed that in satisfaction of the debt, P. should execute his notes for \$1,500, to be paid in three annual installments of \$500 each, which should be secured by mortgage, the notes and mortgage were executed, P. paid one of the notes, T. brought suit on the original debt, disregarding the agreement, *held*, that the mortgage as security was a sufficient consideration to uphold the agreement, and that the accord and satisfaction were complete. *Ibid.*

## ACKNOWLEDGMENT OF DEEDS.

1. **BY MARRIED WOMEN—WHAT SUFFICIENT.**—The rule generally sanctioned by the courts is, that if the officer taking the acknowledgment discloses a substantial compliance with the law, although the forms and words of the statute are not pursued, it will be good. *Russ v. Wingate*, 80 Miss., 446; *Smith v. Williams*, 88 Miss., 48. The mischief which the statute intended to guard against, in requiring a separate examination of the wife, was the undue influence of the husband, which would be implied in his presence. If the wife was separated from the husband although others might be present, she was in a condition to act freely. *Love et al. v. Taylor et al.*, 26 Miss., 574. *Bernard v. Elder*, 336
2. **SAME—CASE IN JUDGMENT.**—An acknowledgment showing an examination separate and apart from the husband, and containing the words "fear, threats or compulsion of husband," omitting the words "as her voluntary act and deed," "freely" is good. *Ibid.*

## ADMINISTRATOR.

1. **CHANCERY PRACTICE—WHEN REAL ESTATE OF DECEDENT LIABLE TO BE SOLD.**—When an administrator or executor ascertains the personal estate of a decedent to be insufficient, then he shall petition the court for a sale of the land. The heir or devisee must be made a party, and may contest the relief sought, by showing that there are no valid subsisting debts, or that there were once sufficient personal assets, which have been wasted by the executor or administrator, and legal remedies have been exhausted on his bond. *Paine v. Pendleton*, 32 Miss. R., 323. *Hargrove v. Boskin*, 194
2. **SAME—POWER OF ADMINISTRATOR OVER IT.**—Immediately upon the death of the ancestor the real estate descends to the heir, and as against him the liability of the land to be sold for the decedent's debts must be established in the mode pointed out by the statute. The administrator cannot interfere, nor has he any interest in or power over the land. *Ibid.*
3. **SAME—POWER OF CHANCERY COURT.**—The chancery court has not the power under its equity jurisdiction, to reach the real estate of a debtor, except upon the predicate that the creditor had an equity in the form of a charge or incumbrance. If the charge or equity is created by statute, with a mode of procedure clearly defined, that remedy must be pursued. The creditor by judgment against the personal representative, acquires a lien on the assets in his hands. As against the real estate, the judgment confers no greater privilege than the note or bond upon which it was founded. *Ibid.*
4. **POWER OF JUDGMENT CREDITOR AGAINST A DECEDENT'S ESTATE.**—A creditor having judgment against a decedent's estate, has not advanced a right to subject the land. Nor is he aided by the fact that the final process against the personal assets has been fruitless. That is a creditor's bill, proposing to withdraw the administration of the real assets from the statutory jurisdiction of the chancery court, to be dealt with under its general equity powers, which the law does not permit. *Ibid.*
5. **SAME—ADMINISTRATOR—HOW FAR HE IS A TRUSTEE.**—It has been some times said, that an executor or administrator holds the assets in the character of a trustee, and that the jurisdiction of equity attaches on the existence of the trust. It is true that, in one sense, an executor or administrator may be called a trustee, as any person may be so called who is bound to apply property for the benefit of others; but he is not a trustee in that technical sense, so as to give a court of equity jurisdiction on the grounds of equity alone. The jurisdiction of the chancery court and the probate court are separate and distinct in their powers, purposes and objects, and are not to be confounded, though administered by the same tribunal. *Troup v. Rice*, 49 Miss., 250. *Smith v. Everett*, 575

6. **SAME—SUIT ON THE BOND OF AN ADMINISTRATOR.**—The sureties on an administration bond cannot be properly joined in proceedings against the administrator for an account and final settlement of the estate. They are responsible only upon the bond, and must be sued at law, after proper steps have been taken to fix the liability of the administrator. *Green, Adm'r, v. Tunstall*, 5 How., 651. The bond, with its conditions, is not intended to transfer the jurisdiction from the probate court. *Ibid.*
7. **SAME—SAME—CONSTITUTIONAL LIMIT, REVISED CODE 1871, SEC. 976.**—So much of section 976, of the Revised Code of 1871, as attempts to confer upon chancery courts power and jurisdiction to entertain suits on the bonds of executors and administrators and guardians, is unauthorized by the constitution, and void. *Ibid.*

*Revivor of Judgment by.* See CHANCERY PRACTICE, 3. LIMITATION OF ACTIONS.

### ADMINISTRATOR'S BOND.

See ADMINISTRATOR, 6, 7.

**REMEDY THEREON.**—A bill in equity will not lie against an administrator and the sureties on his bond for a *devastavit* or misappropriation of the assets of his intestate. In such cases the remedy is at law upon the bond. *Halfacre v. Dobbins*, 766

### ADVANCEMENT.

1. **HUSBAND AND WIFE—PURCHASE OF LAND—ADVANCEMENT.**—Where the husband purchases land with his own money, and has the deed made to his wife, if she acquires any right in the land, it is by way of advancement, and this will depend upon the intention of the parties at the time of the transaction. The question of advancement under such circumstance, though presumed in the first instance, is a question of pure intention, and, therefore, any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption; and any acts or facts, so immediately after the purchase, as to be fairly considered a part of the transaction, may be received for the same purpose; and this presumption is stronger in favor of a wife than a child, for the reason that she cannot, at law, be trustee of her husband. *Wilson v. Beauchamp*, 24

### AFFIDAVIT.

**SIGNATURE OF AFFIANT.**—Where the statute requires an affidavit to be made by a party praying an appeal from a justice's court, the certificate of the justice of the peace that the affidavit required by law was made, is suf-



cient evidence that the affidavit was made, although the affiant omitted to sign his name to the affidavit. The signature of the affiant is not an indispensable requisite. Rev. Code, 1871, § 1832; *Redus v. Wofford*, 4 S. & M., 591. *Brooks v. Snead*, 416

**AFFIDAVIT AND BOND.** See EVIDENCE, 6.

**AGENCY.**

*Ratification of Acts of Agent in submitting to Arbitration.* See ARBITRATION AND AWARD.

*Husband not General Agent of Wife.* See HUSBAND AND WIFE.

**AGRICULTURAL ACT.** See REPEAL OF STATUTES.

**ALTERATION OF PROMISSORY NOTE.** *Effect of.* See BILLS AND NOTES, 4, 5.

**ANSWER MUST BE SWORN TO.** See CHANCERY PRACTICE, 18.

**APPEAL.**

1. **JURISDICTION OF SUPREME COURT IN APPEAL OR CERTIORARI FROM A JUSTICE OF THE PEACE.**—The statute provides that in all cases of appeal from the judgment rendered in the court of a justice of the peace to the circuit court, when the amount in controversy exceeds the sum of fifty dollars, either party shall be entitled to a writ of error from the judgment of the circuit court, to the supreme court, as in cases originating in the circuit court. Rev. Code, 1871, § 1834. In cases originating before justices, it is the *amount* that gives jurisdiction to this court, and that amount must exceed fifty dollars. Appeals and writs of *certiorari* are only different modes of getting cases from the justice's court to the circuit court, and do not affect the question of jurisdiction. *O'Leary v. Harris*, 13
2. **FROM JUSTICE'S COURT—AFFIDAVIT.**—The omission of the word "delay" in an affidavit for appeal, sued out within the time prescribed by statute, cannot defeat the object and purpose of the appeal, which is, in the language of the affidavit, that justice may be done. *White v. Skumate*, 130
3. **SAME—AMENDMENT THEREOF.**—Where an affidavit for an appeal does not substantially comply with the statute—the court upon application should allow the party to amend it, provided the application to amend is made within a reasonable time. *Ibid.*

## APPEAL FROM JUSTICE COURT.

### See FORCIBLE ENTRY, ETC.

1. **JUSTICE OF PEACE—APPEALS.**—This court upon a writ of error from the circuit court cannot review the proceedings in the case had before a justice of the peace, and correct any irregularity therein. *Prewett v. Nash*, 584
2. **SAME—JUDGMENT—DAMAGES.**—On an appeal from a justice of the peace to the circuit court, if the verdict be for the plaintiff in the original suit, ten per cent. damages shall be included in the judgment, and the judgment should be rendered against the principal and his sureties on the appeal bond jointly. Code of 1871, § 1834. *Ibid.*

## APPROPRIATION OF CREDITS.

The law appropriates credits most beneficially for the debtor. The rule is, that where a party is indebted on mortgage and on simple contract, and makes a payment without direction as to its application, the law will apply it to his advantage, i. e., to the mortgage. *McLaughlin v. Green*, 48 Miss., 205; *Poindexter v. LaRoche et ux.*, 7 Smed. & Mar., 718. *Neal v. Allison*, 175

## ARBITRATION AND AWARD.

1. **ARBITRATION AND AWARD—EQUITY—JURISDICTION TO ENFORCE IT.**—Where parties submit a matter of controversy to the award of arbitrators, a court of equity has no peculiar jurisdiction to enforce the award, if it be for the payment of money only, but the court will interfere in the exercise of its ordinary jurisdiction as applied to the specific performance of agreements; and if the arbitrators, in the proper exercise of the power conferred upon them by the terms of the submission, award a specific performance, a court of equity will enforce such performance, though not made a special rule or order of the court. *M. & O. R. R. Co. v. Scruggs*, 285
2. **SAME—SAME—JURISDICTION TO ENFORCE SPECIFIC PERFORMANCE.**—A court of equity has jurisdiction to enforce specific execution of an award concerning real estate, or of agreement for the purchase or sale of real estate, notwithstanding it involves the enforcement of an award to pay money. The jurisdiction of the court of equity will not be ousted and the ends of justice defeated, because of an obligation in the award to pay money. *Ibid.*
3. **SAME—TERMS OF SUBMISSION.**—Where, by the terms of the submission,

the amount fixed by the award was to be a *lien* on the property, which could be enforced only in a court of equity, by sale under a decree of the chancery court, the *lien* attached upon the making of the award, and furnished an element of equity jurisdiction. *Ibid.*

4. SAME—SAME—POWER TO DECIDE QUESTIONS OF LAW AND FACT.—

Where the terms of the submission confer upon the arbitrators the power and duty of construing a contract and ascertaining the value of the property to be surrendered by the terms of the said contract, thus involving questions of both law and fact, the arbitrators have the power and the right to decide both. Generally, arbitrators have full power to decide upon questions of law and fact, which arise directly or indirectly, in considering and deciding questions embraced in the submission. When not limited by the terms of the submission, they have the power to decide all questions of law necessary to the decision of the matter submitted, because they are judges of the parties' own choosing. Their decision of matters of law and fact, thus acting within the scope of their authority, their award is conclusive, and is within the principle of *res adjudicata*; it is a *final judgment* for that case and between these parties.

*Ibid.*

5. SAME—SAME—POWER OF A MARRIED WOMAN TO SUBMIT A CONTROVERSY TO ARBITRATION.—

At common law, the sole submission of a *feme covert* was void. By the custom of London, she could become a sole trader and carry on business; she could then submit disputes respecting her business to arbitration. But since a married woman cannot convey her real estate without the joinder of her husband in the deed, her sole submission of a dispute, which might result in her being ordered to make a conveyance, would be void; but if she join with her husband in the submission, it would be binding.

*Ibid.*

6. SAME—SAME—LEASES.—Leases are chattels real, and constitute a very important, and frequently a very valuable species of personal property, and as such, under the control and disposition of married women. By the purchase of a lease from the husband, by the wife, she becomes the owner of the lease, and had the right to convey the same, and hence, a submission of the same to arbitration would be binding on her, notwithstanding her coverture.

*Ibid.*

7. SAME—SAME—POWER OF THE MEMPHIS AND CHARLESTON R. R. CO. TO SUBMIT A DISPUTE TO ARBITRATION.—The resolution passed on January 25, 187-, by the board of directors, was as follows: "It was resolved, that the president is hereby authorized to receive the hotel at valuation as provided for by said contract." The company being a corporation aggregate, could act only through the instrumentality of an agent or attorney. The resolution conferred power upon the president of the rail-

road to "agree with the proprietor," and this has been held to authorize an agreement to pay such sum as arbitrators should award. *Alexandria Canal Co. v. Swan*, 5 Howard (U. S.), 88. *Ibid.*

8. **SAME — SAME — RATIFICATION OF THE ACTS OF AN AGENT IN SUBMITTING TO ARBITRATION.** — Where the agent submitted a controversy to arbitrators, and the principal appeared by their agent and counsel without objection to the reference, it amounts to a ratification of the acts of the agent, in the submission, and estops the principal from making any objection after the award is made, so far as the acts of the agent are legal and valid. *Ibid.*

**ARRAIGNMENT.** See **CRIMINAL LAW.**

### ASSAULT AND BATTERY.

1. **PROVOCATION.** — The general rule on the subject of provocation is, that under the general issue, the defendant, in mitigation of damages, may give in evidence a "provocation," provided it was so recent and immediate as to induce a presumption that the violence was committed under the immediate influence of the passion excited by the provocation. 2 Greenleaf's Evid., sec. 93. *Martin v. Milnor*, 42
2. **EXTENUATION.** — What is done under the influence of passion provoked by the opposite party at the time of the assault, is proper to be considered by the jury in extenuation of the offense. But what is done a day or two after the provocation received is not the result of that passion, but is the deliberate infliction of vengeance for an injury real or supposed. *Collins v. Todd*, 17 Mo., 537; *Lee v. Woolsey*, 19 Johns., R., 321; *Coxe v. Whiting*, 9 Missouri R., 531. *Ibid.*

**ASSAULT WITH INTENT TO KILL.** See **CRIMINAL LAW**, 17, 18.

**ASSIGNMENT.** See **BILLS AND NOTES**, 1, 2, 3.

**ASSUMPSIT.** See **WARRANTY.**

### ATTACHMENT.

See **STOPPAGE IN TRANSITU.**

1. **CLAIMANT'S BOND — ISSUE THEREON.** — In an issue on a claimant's bond, the burden of proof is on the plaintiff. It is not necessary that he should show title to the property in himself. He will succeed by showing title in a stranger, as thereby he demonstrates that the property is not liable to the creditors' demand. *Thornhill v. Gilmer*, 4 S. & M., 153. *Irion v. Hume*, 419

2. **WHEN OBLIGOR RELEASED—RULE AT COMMON LAW.**—At common law, when the condition of the bond is possible at the time of making it and before the same can be performed, becomes impossible by the act of God, or of the law, or the obligee, then the obligation is saved. If the condition is impossible at the time of making the bond, the condition is lost and the bond becomes absolute. *Ibid.*
3. **CASE IN JUDGMENT.**—S. D. & Co., in 1861, levied an attachment upon certain slaves, supposed to belong to S. I. and W. I. The wives of each preferred a claim to a portion of the slaves levied upon, and gave the claimant's bond. In 1861, the attaching creditors tendered an issue which was joined in 1866 by D. I., one of the claimants; upon the trial, the jury found for the plaintiffs, but failed to assess the value of the property attached: *Held*, that it was error in awarding a judgment for the value of the slaves as assessed by the sheriff in his return upon the attachment, and that as there was no property subject to the plaintiff's debt, there could rightfully be no assessment of value, nor could there be judgment for the sum so determined. *Ibid.*
4. **RETURN THEREON—ITS OFFICE.**—An officer levying a writ of attachment is required by § 1436 of the Code of 1871, to make a full return thereon of all his proceedings. It cannot be presumed that he levied on any other property than that specified in the return of the writ. *Phillips v. Harvey*, 499
5. **JUDGMENT AGAINST SURETIES.**—It is error to render judgment against the sureties on a replevin bond for the whole amount of the plaintiff's demand, they being liable only for the assessed value of the property, when the jury have omitted to assess the value of the property attached and replevied. *Richard v. Mooney*, 39 Miss., 357. *Ibid.*
6. **SAME—CASE IN JUDGMENT.**—The sheriff having returned the writ of attachment as levied upon a certain note: *Held*, that although the plaintiffs in error might have become sureties upon a bond purporting to be a replevin bond for the release of certain mules, plows, etc., claimed to have been attached, yet as the sheriff's return did not show any levy upon such personal property, and the jury not having assessed the value of the property, it was error to render a judgment against them. *Ibid.*
7. **PRACTICE—CIRCUIT COURT—ATTACHMENT.**—When an attachment is levied on property, and a claim is set up by a third party, and the controversy is between the attaching creditor, and the claimant presents an issue, the plaintiff in the attachment holds the affirmative of the issue, and must show the concurrent circumstances, which would warrant a sale of the property for the payment of his debt. He must prove that the defendant in attachment owes the debt or some part thereof. *Dickman v. Williams*, 500

8. **ATTACHMENT—JUSTICE OF THE PEACE—JURISDICTION.**—Where M. sued out two attachments against S. & Co., on two promissory notes, one for \$112.70, and the other for \$189.28, making the sum of \$251.98: *held*, that the plaintiff could not divide his claim so as to bring it within the jurisdiction of a justice of the peace, and that the justice of the peace had no jurisdiction of the case. Such a division of a claim is prohibited by the law, in order to prevent a multiplicity of suits and unnecessary accumulation of costs. Const., art. 6, section 28; Grayson v. Williams, Walker, 296; Scofield v. Pensons, 4 Cushman, 402. *Morris v. Shyrook*, 590
9. **SAME—CIRCUIT COURT—CERTIORARI.**—When a cause is brought by *certiorari* from a justice's court, to the circuit court, the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings, and in case of affirmance of the judgment of the justice, the same judgment shall be given as on appeals. In case of a reversal, the circuit court shall enter up such judgment as the justice ought to have entered, if the same is apparent, or may then proceed to try the cause anew on its merits. Rev. Code, 1871, § 1336. *Ibid.*
10. **SAME—NEW TRIAL BY JUSTICE'S COURT.**—Where the attachment is sued out and levied, and a third party claims the goods, and tenders an issue, and upon that issue the jury found for the defendant, and the justice of the peace sets aside the verdict and grants a new trial: *held*, that the justice had no power to set aside the verdict and grant a new trial; and even if that court possessed such power, it is not such a judgment as could be removed to the circuit court by appeal or *certiorari*, being only an interlocutory order in the progress of the cause. Where there is a verdict in a justice's court, in a case in which he has jurisdiction, it is his duty to enter judgment on such verdict, and his action in setting aside the verdict and granting a new trial is simply void, and could furnish no grounds for carrying the case to the circuit court, and the circuit court would have no power to retain the suit and try it. *Ibid.*
11. **GARNISHMENT.**—It is well settled that judgment cannot be rendered against the garnishee until after the recovery of judgment against the defendant in the attachment. *Erwin v. Heath*, 795
12. **SAME—PROCEEDINGS AGAINST A GARNISHEE.**—A proceeding against a garnishee, in one aspect, is an original action. In another, it is a means for procuring satisfaction of the recovery against the chief defendant. It is a dependency of the attachment. Hence, the garnishee cannot object to mere irregularities and errors in the judgment against the defendant in attachment. Nor can he assign such for error in this court, unless the objection be so vital as to render the judgment against the defendant invalid and void. *Ibid.*
13. **SAME—SAME—NOTICE.**—An attachment suit, under the statute, may be

the blending of two processes, the one strictly *in rem*, the other *in personam*. The former consists in the levy of the writ upon the property of the debtor or the sequestration of the effects of a debtor or a debt due to him, by service of garnishment process. If the defendant is served personally with notice of the suit, it then assumes the form of a personal action. One of these may succeed; the other fail. *Ibid.*

14. CASE IN JUDGMENT. — Judgment final was rendered against E., as garnishee, for want of an answer. There were no irregularities in this proceeding, but the clerk failed to mail notice of the suit to T., the defendant in attachment: *Held*, that this did not render the judgment against T. void, but voidable only, and that E., the garnishee of T., cannot assign for error in this court, errors and irregularities in the judgment against T., the original defendant in the attachment. *Ibid.*

AUDITOR. *His Power under act of March 15, 1872.* See REPEAL OF STATUTES.

BATTERY. See ASSAULT AND BATTERY.

### BILLS AND NOTES.

1. ASSIGNMENT OF A NOTE BY A VENDOR TRANSFERS THE LIEN. — The assignment of a note by a vendor of land transfers *pro tanto* the security which vendor had for its payment. *Tanner v. Hicks*, 4 Smed. & Mar. Reps., 294. If the land is conveyed to an innocent and *bona fide* purchaser, the vendor who held the legal title as security, as well for his assignee as for himself, becomes thereby trustee for his assignee, and if he be faithless and destroy the lien on the land, he is still liable as trustee for the purchase money which he has realized. *Pitts v. Parker*, 44 Miss. R., 252; *Terry et al. v. Woods et al.*, 6 Smed. & Mar., 149; *Parker v. Kelly*, 10 Smed. & Mar., 191. *Cummings v. Oglesby*, 153
2. ASSIGNMENT OF PURCHASE MONEY. — An assignment of the purchase money or any part of it, invests the assignee with all the rights of the vendor. It cannot be displaced but by some act of the assignee. It may be postponed in favor of an innocent purchaser, without notice, who has parted with value. *Ibid.*
3. REMEDY IN EQUITY OF THE ASSIGNEE OF A NOTE. — The assignee of a note for the purchase money can maintain a bill against the vendor and vendee or their respective representatives, to enforce the lien and for specific performance of the contract of sale, and it is no objection to the bill that a deed was not tendered, for the title did not reside in the complainant and he could only reap the benefit of his equity by demanding that the parties to the contract of sale shall be held to the performance of their respective covenants. *Kimbrough v. Curtis*, 117

4. **PROMISSORY NOTES—ALTERATIONS—EFFECT THEREOF.**—Words written on the back of a note are no part of the body thereof *prima facie*, but are presumed to be done after the note is completed. The test of the materiality of any indorsement or memorandum on the back or foot of a note is the time and the intent of it. If made before or at the time of the execution, it forms a part of it and may control the obligation in some important particulars. But being disconnected from the body of the instrument to which the maker's name is signed, it forms no original part of it, until shown to have been upon it when executed. *Bay v. Shrader*, 826
5. **SAME—CASE IN JUDGMENT.**—S. gave B. two promissory notes for \$500 each, secured by an agricultural mortgage. At the time of the execution, B. indorsed on one of the notes \$250 to be paid on the 1st of January, 1872, and \$250 to be paid on the 1st of January, 1873. These indorsements were subsequently erased: *Held*, that the note so erased could not be the foundation of a suit to recover. *Ibid.*
- BOARD OF SUPERVISORS.** *Their power to subscribe for stock in aid of railroads.* See CONSTITUTIONAL LAW.
- BOND OF CLAIMANT IN ATTACHMENT.** See ATTACHMENT, 1, 2.
- BONDS OF COUNTIES** *Issued in aid of railroads.* See CONSTITUTIONAL LAW, 11.
- BOND OF INDEMNITY.** See SHERIFF.
- BOND OF INDEMNITY.** *Damages upon, how recovered.* See PRACTICE, 8.
- BOND OF TAX COLLECTOR.** See BOND OF OFFICER.

### BOND OF OFFICER.

1. **BOND OF TAX COLLECTOR—FORM OF BOND NOT ESSENTIAL.**—Under the provisions of the Code of 1857, prescribing the form of official bonds, the act is declared to be directory only; and a failure to observe the form of the bond will not vitiate it, if it is sufficient in substance, and contains the proper conditions. *Boykin v. State*, 875
2. **PRACTICE—SUIT ON BOND OF TAX COLLECTOR, JUDGMENT BY DEFAULT.**—Suit may be maintained on the bond of a tax collector for money collected and not paid over; also for a failure to collect the taxes of his county. The Code of 1857, p. 521, provides that in actions of debt for a sum certain, and in actions founded on any instruments of writing, ascertaining the sum due or on an open account, \* \* \* if judgment be rendered by default, the clerk shall calculate the principal and interest and judgment shall be entered therefor. Under arts. 59, 60, 61, Code of 1857, these terms are used, "all taxes collected;" "the amount of taxes due



the state," and "amount due by the collector," deducting all legal allowances. The allowances to be deducted include insolvencies, delinquencies, lands forfeited, etc., and this indicates the scope of the trial to determine the amount for which a defaulting tax collector shall be held liable to the state. *Ibid.*

8. **SAME — SAME — WRIT OF INQUIRY.** — Suit was brought on the bond of Boykin as tax collector of Wayne county, for failure to collect and pay over to the state treasurer, the sum of \$845.13, a part of the state taxes of 1869. Judgment by default was rendered against B. and his sureties on his official bond for the amount of the demand, and 30 per cent. damages: *held*, that the court should have awarded a writ of inquiry to ascertain the amount due to the state by the tax collector, after deducting all legal allowances. *Ibid.*

### BOND FOR TITLE.

1. **RULE WHEN PART OF THE PURCHASE MONEY IS PAID.** — When land is sold and bond given for title, if any portion of the purchase money be paid before judgment, the land is not subject to sale under execution as the property of the vendor. In such cases the title of the vendor is held in trust for the vendee. If the entire purchase money has been paid, then the vendee becomes, in equity, the complete owner of the estate. *Taylor v. Lowenstein*, 378
2. **SAME — SAME — RIGHTS OF JUDGMENT CREDITOR.** — A judgment creditor of the vendor, at the date of executing the bond for title, can either sequester the purchase money by summons in garnishment, or he can bring a bill in chancery against the vendor and vendee, and ask that the equity of the vendor upon the land as security for the purchase money be applied to the satisfaction of his judgment. *Ibid.*

**CANCELLATION OF DEEDS.** See **CHANCERY PRACTICE**, 17.

### CERTIORARI.

See **JURISDICTION**.

1. **JUSTICE'S COURT — CERTIORARI.** — When the justice's court renders judgment against a party, and he carries the case to the circuit court by *certiorari*, it is his duty to appear in that court at the return of the *certiorari*, and point out the errors, if any exist, and if he fail to do so, and the circuit court affirm the judgment, he cannot be allowed here to avail himself of his own negligence in allowing the affirmance by default. *O'Leary v. Bolton*, 173
2. **SAME — CIRCUIT COURT — CERTIORARI.** — When a cause is brought by *certiorari* from a justice's court to the circuit court, the court shall be com-

fined to the examination of questions of law arising or appearing on the face of the record and proceedings, and in case of affirmance of the judgment of the justice, the same judgment shall be given as on appeals. In case of a reversal, the circuit court shall enter up such judgment as the justice ought to have entered, if the same is apparent, or may then proceed to try the cause anew on its merits. Rev. Code, 1871, § 1836. *Morris v. Shyrook*, 590

### CHALLENGE.

1. **JUROR — PEREMPTORY CHALLENGE.** — The peremptory challenge of a juror by the state, after he has been presented to the prisoner, is in disregard of the positive letter of the statute. "All peremptory challenges by the state shall be made before the juror is presented to the prisoner." Rev. Code, 1871, § 2761. *Stewart v. State*, 587

### CHANCELLORS.

1. **POWER OF THE GOVERNOR TO APPOINT CHANCELLORS.** — Chancellors shall be appointed in the same manner as the judges. Judges of the circuit court shall be appointed by the governor, with the advice and consent of the senate. The appointment by the governor, without the advice and consent of the senate, would not confer a right to the office. Where the constitution has provided a mode for filling vacancies in particular offices, that is the exclusive mode, and the legislature can prescribe no other. In county offices, the vacancy shall be filled by an election which shall be ordered by the board of supervisors. To fill a vacancy in the office of chancellor, the senate must share with the governor the duty and responsibility of the appointment. When the senate is in session, and the term of a chancellor is about to expire, and will expire by limitation before the next session of the senate, the governor should nominate a person to fill the vacancy and send his name to the senate for their concurrence; and if he fails to do so, he cannot make a valid appointment, to fill such vacancy in the vacation of the senate; that would be to limit and abridge the right of the senate to advise and consent to the appointment of the officer. *Brady, Dist. Att'y, ex rel. v. Howe*, 607
2. **SAME — REMOVAL FROM OFFICE.** — The governor has no authority to revoke an appointment, and treating that revocation as creating a vacancy, fill the office by the appointment of another person. The constitution does not intend that the executive appointee to a chancellorship is tenant of the office at the governor's sufferance, and is removable at his pleasure. *Ibid.*
3. **SAME — DE FACTO OFFICER.** — C. was appointed chancellor in the vacation

of the senate, to fill a vacancy caused by the expiration of a full term: *held*, that the appointment was void; but for the repose and quiet of society, he is constituted *de facto* chancellor, and imparted virtue and validity to his judicial acts. A *de facto* officer is competent to do whatever a *de jure* officer may do, this prevents a failure of justice and avoids confusion.

*Ibid.*

CHANCERY CLERK. See OFFICE.

## CHANCERY PRACTICE.

### See WRIT OF ASSISTANCE.

1. MULTIFARIOUSNESS. — Where J., as guardian of certain minors, sold real estate on time, under an order of the probate court, and took notes for the purchase money, and F. becoming the purchaser; and afterwards, J. sold other real estate, as administrator, and F. became the purchaser again, and executed notes for the purchase money, J. filed his bill to enforce his lien on the notes payable to him, both as guardian and as administrator: *held*, that the bill was bad, for multifariousness. *Jones v. Foster*, 47
2. SAME—SAME. — The bill cannot join several distinct, unconnected subjects, against the same defendant or against several defendants. *Ibid.*
3. SAME—CASE IN JUDGMENT. — A party cannot be pursued in the same suit in the double capacity of guardian and administrator, because the liabilities are separate and independent. *Wren v. Gayden*, 1 How., 365. The complainant, representing in his own person, separate and independent capacities and rights, and the defendant F. is pursued in respect to separate and distinct estates, acquired indifferent rights. Where several subjects are united, it must appear, that as to the subject matters and the relief, all the defendants are connected, though differently, with the entire subject in dispute. *Watson v. Cox*, 1 Ired. Eq. Rep., 289; *Adams' Eq*, 601, 602. *Ibid.*
4. CHANCERY COURT—DEMURRER—FRAUD. — Where the complainant's bill charges a combination to cheat and defraud the complainant, and the defendant filed a general demurrer to the bill: *held*, that the demurrer to that part of the bill charging defendants with a combination to cheat and defraud, was bad. That part of the bill required an answer, and the demurrer should have been overruled. *Shearer v. Shearer*, 113
5. SAME—SAME. — It is a general rule that a demurrer cannot be good as to a part which it covers, and bad as to the rest, and therefore it must stand or fall altogether. *Ibid.*
6. AMENDMENTS TO BILLS. — The practice in this state, under the liberal rules of amendments of pleadings authorized by statutes, is to entrust to

the courts of original jurisdiction a very large discretion over the pleadings. It is no abuse of that discretion to allow a defendant to withdraw an answer and put in a demurrer to the bill, especially if the bill does not state a title to the discovery and relief sought. *Kimrough v. Curtis*, 117

7. **SAME—CONTRACT—MUTUAL AND DEPENDENT.**—Where a conveyance is to be made upon payment of the purchase money, the respective acts are dependent and neither party can insist upon the performance of the thing stipulated to be done by the other without performance or an offer to perform upon his part. A mere allegation in the bill of an offer and readiness to make a deed will not do. *Klyce v. Broyles*, 87 Miss. Rep. 524. *Robinson v. Harbour*, 42 Miss., 800. *Ibid.*
8. **SAME—NECESSARY PARTIES, ETC.**—Where the administrator of the vendor is the complainant, asserting against the assignee of the vendee, the security held by him for the debt, the heirs of the vendor are necessary parties, so that their title may be divested. That must be so unless the administrator tenders a proper deed from the heirs. *Ibid.*
9. **SAME—REMEDY IN EQUITY OF THE ASSIGNEE OF A NOTE.**—The assignee of a note for the purchase money can maintain a bill against the vendor and vendee or their respective representatives, to enforce the lien and for specific performance of the contract of sale, and it is no objection to the bill that a deed was not tendered, for the title did not reside in the complainant and he could only reap the benefit of his equity by demanding that the parties to the contract of sale shall be held to the performance of their respective covenants. *Ibid.*
10. **CHANCERY COURT—WRIT OF ASSISTANCE.**—The decree to sell lands directed the commissioner to "put the purchaser in possession; if necessary that the writ of assistance be awarded." It is no longer a mooted question, that when equity has jurisdiction of a cause, it will retain it for all the legitimate purposes of the proceedings. It will retain jurisdiction in order to administer full relief. 10 S. & M., 184; 34 Miss., 655; 27 lb., 419; 13 S. & M., 181; 83 Miss., 153. And this includes, in proper cases, the delivery of possession of real estate. Rev. Code, 1871, § 1267; 13 S. & M., 182. The writ of assistance is a process "well known to the law." 2 Daniels Ch. Pr., 1082; 1 Barb. Ch. Pr., 441. *Griswold v. Simmons*, 128
11. **SAME—WHEN THE WRIT OF ASSISTANCE SHALL ISSUE.**—The writ of assistance should issue upon the complainant filing with the clerk a petition, and proof of service of the order of the chancellor upon the defendant, and demand of possession, and his refusal to surrender. *Ibid.*
12. **VENDOR AND VENDEE.**—S. sold a tract of land to G., reserving the vendor's lien in the deed and in the notes. The deed was duly recorded.

G. sold a part of the land to W. G. and W. are made parties to the bill. W. did not defend, and *pro confesso* was taken as to him. The lien and the equity are conceded. There was no interlocutory order confirming the master's report; *held*, that the report of the master in chancery was confirmed in terms by the final decree, and that this action of the court was not error. Where the attention of the chancellor is not called to the points in the case, they cannot in any case be considered in this court. *Griswold v. Simmons*, 137

13. **SAME — CROSS BILL — EVIDENCE.** — A cross bill does not stay proceedings in the original cause, except by order of the court. 2 Barb., Ch. Pr., 134; 2 Dab., 1656. If the cross bill be taken as confessed, it may be used as evidence against complainant in the original cause on the hearing, and will have the same effect as if he had admitted the same facts in the answer. 2 Barb. Ch. Pr., 135. The cross bill will not delay the hearing of the original cause. 2 Paige, 164; Story's Eq. Pl., § 402. *Ibid.*
14. **SAME — RULES.** — It is correct practice to order a referee to compute amount due after a cause is set for hearing, without remanding to rules. *Ibid.*
15. **RIGHT OF RESCISSION WHEN VENDOR CANNOT CONVEY TITLE.** — Where vendor of a tract of land cannot make title to the same, the general principle is, that in such circumstances the purchaser has an election, either to abandon the contract and to be repaid what he has advanced, or he may compel the vendor to convey to him such estate or interest as he has, and make compensation for the residue. *Martlock v. Buller*, 10 Vesey R., 815. *Jackson v. Ligon*, 3 Leigh, 161. *Mathews v. Patterson*, 2 How., 720. *Wilson v. Cox*, 133
16. **VENDOR AND VENDEE.** — In December, 1868, G. sold and conveyed to H. two tracts of land, by deed, absolute on its face; H. paid cash, \$400, and gave his notes for \$800. In 1869 H. sold and conveyed one of these tracts of land to L., by deed absolute on its face. Payment to H. was secured only by the notes of L. who had notice that H. was still indebted to G. for this land. In March, 1870, H. and wife, with the consent and approval of L. executed a trust deed on *both* these tracts of land, to secure to G. the purchase money due him from H. L. agreed to join in this deed, but did not. Afterwards L. sold and conveyed the one tract to B. The latter did not make a search in the clerk's office for conveyances or incumbrances and had no notice in fact of the trust deed. Was B. a *bona fide* purchaser from L? *Held*, that he was. *Baker v. Griffin*, 158
17. **SAME — CANCELLATION OF DEEDS.** — On a bill filed by G. against H. L. & B. to cancel all the conveyances, it appearing that H. was still indebted to G. and L. to H. and B. to L., though the particular relief sought was refused as to B. G. was allowed to retain his bill with a view to retain to himself the balance of purchase money due from B. to L. *Dodge v. Evans*, 48 Miss., 570. *Ibid.*

18. ANSWER MUST BE SWORN TO. — In this state an answer to a bill in equity must be sworn to, otherwise it will, upon motion of complainant, be stricken from the files, and if the respondent declines to plead further, the cause may proceed regularly to final decree. This is the established practice in England and America. 1 Daniels Ch. Pr., 749, et seq. and notes. It is also the established practice in this state. Code of 1857, p. 547, art. 55; Rev. Code, 1871, § 1029. *Hodges v. Phillips*, 862
19. BILL IN CHANCERY — DEMURRER — ITS EFFECT. — A demurrer to a bill admits all the allegations of fact, well stated in the bill, and reference cannot be had to exhibits to aid the bill. *Littlewort v. Davis*, 408
20. BILL TO SET ASIDE A CONVEYANCE. — Crider conveyed to Norton a tract of land for \$400, on credit. While so indebted, Norton purchased a tract of land from Newell, on credit also, and conveyed a portion of it to Crider, in payment of the \$400. Newell enforced the vendor's lien against all the land sold to Norton, had it sold and became the purchaser, then filed a bill against Crider to set aside the deed from Norton to Crider. There was nothing to show to Crider, or give notice that the purchase money to Newell was unpaid, the deed was in the ordinary form, acknowledging the receipt of the purchase money. *Held*, that Crider was a *bona fide* purchaser. *Newell v. Crider*, 539
21. CHANCERY COURT — JURISDICTION — PRACTICE — BILL TO REMOVE CLOUD ON TITLE. — The statute of frauds denounces absolute nullity, upon every gift, grant or conveyance, made with intent to hinder, delay or defraud creditors. In so far as the creditor is concerned, it is as though it had never been made, and the title was still in the debtor — the fraudulent grantor. The jurisdiction of a court of equity is ample, either before or after sale, to set aside a fraudulent conveyance. It is by virtue of the "lien" that the creditor may go into a court of equity to displace a fraudulent conveyance, even before levy. *Pulliam v. Taylor*, 551
22. PRACTICE — ADMINISTRATOR'S BOND — REMEDY THEREON. — A bill in equity will not lie against an administrator and the sureties on his bond for a *deceitavit* or misappropriation of the assets of his intestate. In such cases the remedy is at law upon the bond. *Halfacre v. Dobbins*, 768
23. WHEN REAL ESTATE OF DECEDENT LIABLE TO BE SOLD. — When an administrator or executor ascertains the personal estate of a decedent to be insufficient, then he shall petition the court for a sale of the land. The heir or devisee must be made a party, and may contest the relief sought, by showing that there are no valid subsisting debts, or that there were once sufficient personal assets, which have been wasted by the executor or administrator, and legal remedies have been exhausted on his bond. *Paine v. Pendleton*, 32 Miss. R., 823. *Hargrove v. Baskin*, 194
24. POWER OF ADMINISTRATOR OVER IT. — Immediately upon the death of

the ancestor the real estate descends to the heir, and as against him the liability of the land to be sold for the decedent's debts must be established in the mode pointed out by the statute. The administrator cannot interfere, nor has he any interest in or power over the land. *Ibid*

25. **POWER OF CHANCERY COURT.**—The chancery court has not the power under its equity jurisdiction, to reach the real estate of a debtor, except upon the predicate that the creditor had an equity in the form of a charge or incumbrance. If the charge or equity is created by statute, with a mode of procedure clearly defined, that remedy must be pursued. The creditor by judgment against the personal representative, acquires a lien on the assets in his hands. As against the real estate, the judgment confers no greater privilege than the note or bond upon which it was founded. *Ibid.*
26. **POWER OF JUDGMENT CREDITOR AGAINST A DECEDENT'S ESTATE.**—A creditor having judgment against a decedent's estate, has not advanced a right to subject the land. Nor is he aided by the fact that the final process against the personal assets has been fruitless. That is a creditor's bill, proposing to withdraw the administration of the real assets from the statutory jurisdiction of the chancery court, to be dealt with under its general equity powers, which the law does not permit. *Ibid.*
27. **CHANCERY PRACTICE—CROSS BILL—ITS FUNCTIONS.**—If the defendant, in his answer, relies for any cause, upon the voidness of the instrument relied upon by the complainant for recovery, he cannot have affirmative relief of cancellation, unless he makes his answer a cross bill. But if it be shown that such instrument, from whatever cause, cannot support a right of recovery, the court should refuse a decree to enforce the instrument and dismiss the bill. The effect of such decree on final hearing is conclusive upon the parties, on all the matters properly put in issue. *Bay v. Shrader*, 326
28. **CROSS BILL—ITS OFFICE.**—A cross bill is a proceeding to procure a complete determination of a matter already in litigation. The party as against the complainant in the original bill, is not obliged to show any ground of equity to support the jurisdiction of the court. Story Eq. Pl., § 389. The appearance of a defendant to a cross bill is enforced in the same manner as to the original bill. 2 Daniels' Ch. Pr., p. 1652. The dismissal of the original bill, as a general rule, would carry with it the cross bill. *Ladner et al., v. Ogden et al.*, 81 Miss., 340. *Thomason v. Neely*, 310
29. **SAME—WAIVER THEREOF.**—If the defendant has neglected for several terms to take out process or prepare the case made in the cross bill, the same may be considered as abandoned, at the final hearing for such laches. It is appropriate as against a judgment creditor, who sues in

equity to set aside a fraudulent conveyance, to claim in a cross bill that the homestead of the defendant debtor may be assigned by metes and bounds. *Ibid.*

CHANGE OF VENUE. See CRIMINAL LAW, 19.

### CHARITABLE DEVISE.

DEVISES FOR CHARITABLE PURPOSES.—Such devises are void under arts. 55 and 56, code of 1857, p. 302, and the heirs of the testator would take whatever was designed for the charity. *Tatum v. McClellan*, 1

### CHATTEL MORTGAGE.

1. LIEN THEREOF—RULE AT COMMON LAW.—While the rule at common law was, that the chattel or thing mortgaged must be in existence at the time of the mortgage, yet there may be a pledge or hypothecation which will take effect in equity so soon as the chattel shall be acquired. The lien attaches to the thing when it comes *in esse* against the mortgagor and all persons asserting a claim thereto under him. A growing crop is subject to mortgage or sale under execution. A judgment subsequent in date is subordinate to an equitable mortgage. *Jayce v. Stovall*, 396
2. MORTGAGES—CROPS.—Whether or not a mortgage could be executed at common law, on a crop before it was planted, it is competent for the legislature to authorize it. This was done by act of February, 18, 1867. *Betts v. Ratliff*, 561
3. SAME—ACT OF FEBRUARY, 18, 1867.—By sec. 7 of act of February 18, 1867, crops of cotton, corn or other agricultural product, being produced or to be produced within fifteen months, can be conveyed by mortgage or deed in trust. Such mortgage or deed in trust will have priority from its date, whether the crop be then planted or not. *Ibid.*
4. SAME—SAME—LIEN THEREOF.—The security given by this act attaches to the commodity in advance of the harvest, and the right to apply it to the uses of the mortgage or deed in trust is as of the day of the date and the mortgagee or *cestui que trust* would have priority over any other creditor or incumbrancer, subsequent to the date of such security. It would be *ultra vires* of the legislature to impair a mortgage or deed in trust by subsequent legislation. The act of 1872 does not repeal nor is it repugnant to the act of 1867. *Ibid.*
5. SAME—ACT OF 1872—LIEN THEREOF.—The first section of this act gives a lien to the laborer or employee for wages, and not the tenant or lessee. The lien takes effect on all agricultural products. If the laborer is to receive moneyed wages there is no product belonging to him upon



which the lien can take effect. If the wages be for a part of the crop, then the lien will take effect upon that. *Ibid*

6. LANDLORD AND TENANT—WHEN RELATION EXISTS.—It is well settled that there may be a letting of land from year to year or for one year. Where the relation of landlord and tenant exists, though the rent is to be paid in part of the product, it is equally well settled, that one may cultivate the land of another for the purpose of making a crop, which is to be divided between the landowner and the cultivator, where the parties would be tenants in common of the crop and not landlord and tenant. Whether the contract be of one kind or the other depends on the intention of the parties, to be gathered from all the attending circumstances. *Ibid*.
7. SAME—CASE IN JUDGMENT.—During the year 1872, W. cultivated land belonging to R., for which he was to pay a certain portion of the crop. R. furnished W. with necessary supplies during the year. In January 1872, W. executed a deed in trust to B. conveying the crop to be grown that year by him, to secure a promissory note. *Held*, that such a contract made W. and R. tenants in common of the crop, but the deed in trust having been executed prior to the passage of the act of April 5, 1872, the lien thereof was superior to the lien created by that statute. *Ibid*.

CONSTITUTIONAL CONSTRUCTION. See CONSTITUTIONAL LAW, 7.

CONSTRUCTION. See WILLS, 3-6.

## CONSTITUTIONAL LAW.

See ADMINISTRATOR, 7. ATTACHMENT, 8.

1. SUBSCRIPTIONS—ART. 12, SEC. 14 OF THE CONSTITUTION—EFFECT THEREOF.—The language of this section assumes that the authority of the legislature is necessary to enable a county, city or town to become a stockholder or to lend its credit. And this discretion is prohibited, "unless two-thirds of the qualified voters of such county, city, etc., at a special or general election shall assent thereto." This section was manifestly intended to guard and protect the local public from the burden of taxation incident to aid extended to railroad corporations, etc. *Haskins v. Carroll County*, 735
2. SAME—HOW PERFORMED.—Aid can be extended to railroad corporations, turnpike companies, etc., by counties or cities, only upon the theory that such internal improvements are for the local public benefit, conducive to the prosperity and common welfare of the local public. *Ibid*.
3. ELECTIONS—REQUISITE MAJORITY—RULE AT COMMON LAW.—The rule at common law is that where the electoral body is indefinite, a majority

of the votes cast determines the election. This principle was originally applied to corporations aggregate, to the elections of officers, but it has been extended in analogous cases to questions propounded to be adopted or rejected. This rule originated in necessity. *Ibid.*

4. **SAME — POWER OF THE LEGISLATURE.** — In the absence of any constitutional restrictions, it is competent for the legislature to prescribe the requisite majority to carry a measure of aid, and unless such majority vote for the measure, it fails. *Ibid.*
5. **ELECTIONS — MODE OF DETERMINING.** — Unless the law under which the vote is taken intends otherwise, the ballot is the test of the number of electors, and that those who refrain from voting acquiesce in what the majority voting do. This is so because of the insuperable difficulty of getting any other mode. *Ibid.*
6. **TAXATION — ITS OBJECTS.** — Taxes are burdens imposed upon people or property by the legislature for public purposes. The object to which aid is extended by a municipality must be public in the sense that it will contribute to the convenience and general advantage of the local public, and such aid should only be extended to those objects which have been recognized by legislative and judicial precedents, as such local public objects among which is a railroad. But this has not met the universal approval of the judicial mind. *Ibid.*
7. **CONSTITUTIONAL CONSTRUCTION — RULE THEREOF.** — The object of construction applied to the constitution is to give effect to the intent of its framers and the people in adopting it. This intent is to be found in the instrument itself. If the words convey a definite meaning which involves no absurdity or contradiction with other parts of the instrument, then that meaning, apparent on its face, is to be adopted. *Ibid.*
8. **SAME — ASSENT — MEANING THEREOF.** — The word assent used in sec. 14, art. 12, of the constitution, must be given its usual and ordinary signification, and that is "agreeing or consenting to," and this can be manifested in an election only by an affirmative action, by actually voting. *Ibid.*
9. **REGISTRATION — EFFECT THEREOF.** — The constitution, art. 8, sec. 2, requires all persons entitled to vote, to be registered; it is a prerequisite to the right to vote. Thus there exists, in every county, evidence of the number entitled to vote. In ascertaining the result of an election requiring two-thirds of the qualified voters to assent thereto, the registration books are competent evidence. It would be open to proof to show deaths, removals, etc., subsequently incurred. The term "qualified electors," used in the constitution, means those who possess the constitutional requisites to register. *Ibid.*
10. **BOARDS OF SUPERVISORS — POWERS THEREOF.** — These are *quasi* corpo-

rations, with a general jurisdiction of the subjects confided to them in sec. 20 of art. 6 of the constitution. The grant of a power of an extraordinary character, such as is not embraced in the general scope of its duties, must be strictly construed. When exerting jurisdiction under a special law, it must act strictly on the condition under which it is given. A county, city or town has no inherent right to become a stockholder or to give aid to a railroad or other association for making public improvement. If empowered so to do, it must conform to the conditions prescribed in the law. The board of supervisors is made, by law, the instrumentality of the county, but its power does not come into existence except upon certain conditions, which are of the nature of conditions precedent. *Ibid.*

11. CASE IN JUDGMENT.—The court reviews at length all the decisions, both state and federal, on the question, as to what defenses can be made to bonds after they get into hands of purchasers for value and without notice. But none of the bonds, in this case, having been issued, this question was not involved, and the court expressed no opinion on the subject. *Ibid.*

## CORPORATIONS.

### See RAILROADS.

1. CIRCUIT COURT—JURISDICTION.—Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation, and cannot migrate to another state. But they are liable to be sued like natural persons, in transitory actions, arising *ex contractu* or *ex delicto* in any state, where legal service of process can be had. Where the defendants in the court below appeared and pleaded to the action, they cannot object to the jurisdiction, and it is too late after the plea of the general issue, to raise the question of the authority of the court finally to dispose of the case. *N. O., J. & G. N. R. R. Co. v. Wallace*, 244
2. PRACTICE—PLEADINGS—NOTICE.—Where an improper notice is attached to a plea of the general issue, the mode of avoiding the special matter proposed to be proved under it is, not by demurrer, but by an objection to the introduction of the testimony. *Wren v. Hoffman*, 41 Miss., 616. *Ibid.*
3. SAME—INSTRUCTIONS—RULE OF LAW.—As corporations can only act in conformity with the law of the state by which they are created, such corporations are responsible as carriers only to the extent, and in conformity to the law of the state, where the contract is made or the duty undertaken, and it will make no difference whether the action is in form *ex contractu* or *ex delicto*. This is in conformity to the general rule of law upon the sub-

ject of contracts and torts, and where railroad corporations are sued out of the jurisdiction by which they were created, and under whose laws alone they can act, the extent and degree of their responsibility must be determined by the law of the place of the existence and action of such corporation. *Ibid.*

4. CORPORATIONS — CONTRACTS THEREOF — WHEN VALID. — If a corporation make a contract outside of the purposes of its creation, it is void, because it had not power over the subject in reference to which it acted. But if it contracts with reference to a subject within its powers, but in so doing exceeds them, the person with whom it deals cannot set up such violation of its franchises to avoid the contract. School trustees are a *quasi* corporation. *Littleworth v. Davis*, 403
5. LIABILITY — IMPLIED CONTRACT. — At common law a corporation could not manifest its intentions by any personal act or oral discourse, and that it spoke and acted only by its common seal. This rule has been relaxed and corporations can now be bound by contracts made by their agents, though not under seal, and also on implied contracts, to be deduced by inference from corporate acts, without either a vote or deed or in writing. The doctrine of implied municipal liability to all cases where money or property of a party is received under such circumstances, that the general law, dependent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city receives money or property which does not belong to her, it is her duty to restore it to the true owner, or if used by her, to render an equivalent to the true owner; from the like general obligation, the law, which always intends justice, implies a promise. *M. E. Church South v. Vicksburg*, 601
6. IMPLIED CONTRACT BY AN AGENT OR SERVANT. — When it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation. If the corporation appoints or elects them and can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of *corporate* powers, and are for the peculiar benefit of the corporation in its local or special interest, they may be justly regarded as its agents or servants, and the *maxim of respondeat superior applies*. 2 Dillon, 772. *Ibid.*

## COUNTY COURT LAW.

JUSTICE OF THE PEACE — COUNTY COURT LAW. — The act of the legislature of July 11, 1870, abolishing the county courts, provides that all suits then pending in said county courts, when the principal of the amount in controversy does not exceed \$150, shall be transferred to any justice's court

at the county seat of the county in which such suit is pending. Where suit was brought in the county court, and transferred to a justice's court at the county seat, which court gave judgment for plaintiff, who appealed to the circuit court. It was error in the circuit court to dismiss the case for want of jurisdiction in the justice's court. *Moore v. Dunn*, 33

**COMMON CARRIERS.** See RAILROADS.

**CONFESSIONS.** *When Admissible as Evidence.* See CRIMINAL LAW, 9. EVIDENCE, 18.

**CONTINUANCE.** See CRIMINAL LAW, 19.

## CONTRACT.

1. **CORPORATIONS—LIABILITY—IMPLIED CONTRACT.**—At common law a corporation could not manifest its intentions by any personal act or oral discourse, and that it spoke and acted only by its common seal. This rule has been relaxed and corporations can now be bound by contracts made by their agents, though not under seal, and also on implied contracts, to be deduced by inference from corporate acts, without either a vote or deed, or in writing. The doctrine of implied municipal liability to all cases where money or property of a party is received under such circumstances, that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city receives money or property which does not belong to her, it is her duty to restore it to the true owner, or if used by her, to render an equivalent to the true owner; from the like general obligation, the law, which always intends justice, implies a promise. *M. E. Church v. Vicksburg*, 601

2. **SAME—IMPLIED CONTRACT BY AN AGENT OR SERVANT.**—When it is sought to render a municipal corporation liable for the act of servants or agents, a cardinal inquiry is, whether they are the servants or agents of the corporation. If the corporation appoints or elects them and can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may be justly regarded as its agents or servants, and the maxim of respondeat superior applies. 2 Dillon, 772. *Ibid.*

*Of Married Women.* See MARRIED WOMEN; HUSBAND AND WIFE.

*Mutual and Dependent.* See CHANCERY PRACTICE, 7.

*Rescission of.* See CHANCERY PRACTICE, 15.

*Of Corporations, when valid.* See CORPORATIONS, 4.

CONSPIRACY. *Acts and Declarations of Conspirators, when evidence.* See CRIMINAL LAW, 8.

## CONVEYANCES.

See DEEDS. FRAUDULENT CONVEYANCES.

STATUTE OF FRAUDS. — Purchases with the debtor's money in the name of a third person, are not embraced in terms by the statute of frauds. *Gowing v. Rich*, 1 Ired., 538. The statute only operates upon conveyances made by the fraudulent debtor. *Lamplugh v. Lamplugh*, 1 Pr. Will., 111. *Winn v. Meacham*, 34

CONVICTION. See CRIMINAL LAW, 17.

CREDITS, APPROPRIATION OF. See APPROPRIATION OF CREDITS.

CREDITORS OF PARTNERSHIP, ETC. See PARTNERSHIP.

## CRIMINAL LAW.

1. INDICTMENT — MISNOMER. — Where the person upon whom the felony is committed is misnamed in the indictment, and this should be shown in evidence on the trial, for such variance the defendant should be acquitted. 1 Amer. Crim. Law (Wharton), § 257. If the name in the indictment, however, be that by which the person is generally known, though different from the true name, the conviction will be good in a capital case. *Meger v. The State*, 42 Miss. Rep., 642. *McBeth v. The State*, 80
2. SAME — ERRONEOUS INSTRUCTIONS — CASE IN JUDGMENT. — The court instructed the jury, that "It is incumbent on the defendant to show clearly that the ill treatment to which the deceased was subjected was *alone* the cause of the death, and if the wound given was dangerous, then the defendant could not shelter himself under the plea of erroneous treatment;" *held*, that this charge did not propound the law correctly, that it was too broad in affirming that the defendant must show that ill-treatment was *alone* the cause of the death, and that the last clause did not neutralize the error in the first, and in view of the testimony, may have misled the jury. Arch. Crim. Prac. & Plead., page 261 and notes. *Ibid.*
3. LARCENY — PRESUMPTION ARISING FROM RECENT POSSESSION OF STOLEN GOODS. — No definite length of time, after loss of goods and before possession shown in the accused, seems to be settled, as raising a presumption of guilt. Where the goods are bulky or inconvenient of transmission, or unlikely to be transferred, it seems that a greater lapse of time is allowed to raise the presumption than where they are light or easily

passed from hand to hand, and likely to be passed, because in the one case, the goods may not have passed through many hands, and the proof to justify the possession may, therefore, be more simple and easy; but in the latter case, the goods may, very probably, have come to the accused through many persons, and their transit, from the smallness of their nature and value, be much more difficult to be proved. Roscoe Cr. Ev., 18; 3 Greenleaf Ev., § 82. *Davis v. State*, 86

4. PRESUMPTION — STRONG OR WEAK, ACCORDING TO THE FACTS AND CIRCUMSTANCES, AND THE LAPSE OF TIME. — The possession must be recent after the loss, in order to impute guilt; and this presumption is founded on the manifest reason that, where goods have been taken from one person, and are quickly thereafter found in the possession of another, there is a strong probability that they were taken by the latter. This probability is stronger or weaker in proportion to the period intervening between the taking and the finding, or it may be entirely removed by the lapse of such time, as to render it not improbable that the goods may have been taken by another and passed to the accused, and thus wholly destroy the presumption. *Ibid.*
5. SAME — SATISFACTORY ACCOUNT OF POSSESSION. — The general rule is undoubtedly well settled, that the possession by a party, of stolen goods, shortly after their loss by the owner, is presumptive evidence of guilt, which, however, may be explained, and if the party in whose possession they are found fails satisfactorily to account for his possession, the presumption of guilt arises from the recent loss by taking, and the possession will stand and warrant a conviction; what will be sufficient to account for the possession, or to remove the presumption which may arise therefrom, will depend much upon the length of time which intervenes between the loss by the owner and the discovery of possession in the party charged, the nature and character of the goods, and all the circumstances of the case, and this, for the most part, is to be determined by the jury. *Ibid.*
6. SAME — REASONABLE ACCOUNT OF POSSESSION. — Where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, it is incumbent on the prosecution to show that the account is false, but if the account given by him be unreasonable or improbable on its face, the *onus* of proving its truth lies on him. *Regina v. Crowhurst*, 1 C. & R. (47 Eng. C. Law R.), 370. The reasonableness of his account must necessarily depend, in a great measure, upon his deportment in relation to the article found in his possession, and upon the time and circumstances under which it is found. *Ibid.*
7. SAME — INSTRUCTIONS — CASE IN JUDGMENT. — Phillips, a merchant in Macon, lost by a larceny, in January, goods to about the amount of \$1,000. Eleven months thereafter, goods bearing the trade mark of P. and in

general description like the goods stolen, to the value of about \$140, were found in the possession of the accused; *held*, that it was error to instruct the jury "that if the jury believe, from the evidence, that goods as described were stolen in January and discovered in the manner as described eleven months thereafter, the time would not be unreasonable." This qualification of defendant's instructions in connection with those given for the prosecution, left no other alternative, logically, than a verdict of guilty; *held further*, that this was virtually an instruction upon the merits, and whether "the time would not be unreasonable," was, with all the facts and circumstances, for the jury. *Ibid.*

8. CONSPIRATORS—ACTS AND DECLARATIONS WHEN EVIDENCE.—The general rule universally recognized is, that a foundation must first be laid by proof, sufficient *prima facie* to establish the existence of a combination before the acts and declarations of any conspirator or accomplice can be given in evidence to charge others. 1 Greenleaf Evid., 126; *Browning v. The State*, 80 Miss. Rep., 656. *Garrard v. State*, 147
9. CONFESSIONS—WHEN ADMISSIBLE.—The doctrine is well established that when a confession is induced by threats, or by a promise or hope of favor held out to the accused by the magistrate or officer making the arrest, it is inadmissible in evidence against him. 1 Greenleaf's Evid., 253. But where there is a conflict of testimony as to whether the confessions were voluntary, it is a question of fact for the jury to determine. *Ibid.*
10. SAME—SAME.—Although the entire confession cannot be received in evidence, the weight of authority is, that so much of the confession as relates strictly to the fact discovered by it, may be given in evidence, for the reason for rejecting involuntary confessions is, the apprehension that the accused may have been induced to say what is false. *Belote v. The State*, 86 Miss. Rep., 96. *Ibid.*
11. CRIMINAL TRIAL—INDICTMENT—HOW PRESENTED INTO COURT.—The authorities in this state are, that the indictment must be brought into court, by the grand jury, as a body or through their foreman, accompanied by the requisite number, and the record must show this affirmatively. *Laura v. The State*, 26 Miss., 176; *Friar v. The State*, 3 How., 423; *Goodwin v. The State*, 4 Smed. & Mar., 535. *Cachute v. State*, 165
12. SAME—SAME—ENTRY BY THE CLERK.—It is not competent for the clerk to certify by way of recital what transpired at a former term of the court. The proceedings of that term as actually entered upon the records of the courts, are the best and only evidence of what occurred in a particular case. *Ibid.*
13. SAME—EFFECT OF § 2794 AND 2795 OF CODE OF 1871.—The first section of this statute recognizes the practice that the minutes of the court must show that the bill of indictment was brought by the grand jury into



court. The second section postpones such entry upon the minutes until the accused has been arrested and is either in custody or at large on bail. The object was to keep the indictment secret until the accused was arrested. Manifestly, this statute does not dispense with a record upon the minutes, of the fact, either at the term at which the indictment was found or at any time "after the appearance of the accused." *Ibid.*

14. **ARRAIGNMENT — PLEA.**—In all cases of felony the record *must* show affirmatively, that the accused was arraigned and plead in person to the indictment. If plea is by attorney, it is as no plea. *Wilson v. The State*, 42 Miss., 641. *Ibid.*
15. **CRIMINAL LAW — PRACTICE — EVIDENCE.**—W. was indicted for the murder of K. Prior to the finding of the indictment, he was tried before a justice of the peace, before whom he made a voluntary statement, which was taken down in writing. On the trial in the circuit court, M., a witness for the state, was permitted to testify to what the accused said in his voluntary statement before the committing magistrate, in opposition to objections from defendant's counsel. *Held*, that the admission of the testimony was error. *Wright v. State*, 333
16. **SAME — EVIDENCE — ADMISSIBILITY.**—As a general rule, the law requires the production of the best evidence of which the nature of the case in its nature is susceptible. Not the greatest amount of evidence of any fact, but its design is to prevent the introduction of any which, from the case, supposes that better evidence is in possession of the party. As the statute requires that the justice of the peace shall reduce to writing the voluntary confession of the accused, and shall certify and send up the same to the next term of the circuit court of the proper county, the law conclusively presumes that he performed his whole duty. If it be shown that the examination was not reduced to writing, or if the written examination is wholly inadmissible by reason of irregularity, parol evidence is admissible to prove what he voluntarily disclosed. And if it remains uncertain whether it was reduced to writing by the magistrate or not, it will be presumed that he did his duty, and oral evidence will be rejected. *Greenleaf's Ev.*, 259, sec. 227. The written statement should have been produced; the oral evidence of the witness should have been rejected. It was secondary and inferior. *Peter v. The State*, 4 S. & M., 31. *Ibid.*
17. **PARTY MAY BE CONVICTED OF AN INFERIOR CONSTITUENT OFFENSE.**—The Rev. Code of 1871, § 2809, provides that a defendant in a criminal prosecution may be convicted of any offense necessarily included in the offense charged in the indictment; *held*, that under an indictment for an assault with intent to kill and murder, the accused may be convicted of a common assault. *Bede, l v. State*, 493
18. **SAME — UNNECESSARY DESCRIPTIVE WORDS IN A VERDICT WILL NOT VI-**

TIATE IT—CASE IN JUDGMENT.—The accused was indicted for an assault with intent to kill and murder, the jury found the accused not guilty as charged in the indictment, but guilty of "assault in an attempt to commit manslaughter:" *held*, that the verdict is good as a finding as to the "assault," leaving off, as surplusage, the descriptive words "in an attempt to commit manslaughter," hence the finding, under the law, was for a misdemeanor only, and accused should have been so punished.

*Ibid.*

19. CRIMINAL LAW—CHANGE OF VENUE—CONTINUANCE.—This court will not reverse a judgment because the circuit court refused to grant a change of venue, unless there has been an abuse of discretion vested in the circuit court. Rev. Code, 1871, § 2762. On application for a continuance, "if compulsory process will possibly obtain the attendance of the absent witness, and the defendant has had no opportunity of obtaining such process, the cause shall be continued, unless the defendant desires a trial." Rev. Code, 1871, § 2806; Noes' case, 4 How., 330; McDaniel's case, 8 S. & M., 401; Lundy's case, 44 Miss., 669. *Stewart v. State*, 587

20. SAME—JUROR—PEREMPTORY CHALLENGE.—The peremptory challenge of a juror by the state, after he has been presented to the prisoner, is in disregard of the positive letter of the statute. "All peremptory challenges by the state shall be made before the juror is presented to the prisoner." Rev. Code, 1871, § 2761.

*Ibid.*

21. SAME—INSTRUCTIONS—ORAL.—It is a violation of the law and the well settled practice and policy of the state, to give oral instructions, on the court's own motion, in civil or criminal cases. Rev. Code, 1871, § 643.

*Ibid.*

CURTESY. See HUSBAND AND WIFE, 14-30.

CROPS, GROWING. *Mortgage on*. See CHATTEL MORTGAGE.

## CROSS BILL.

See CHANCERY PRACTICE.

4. A cross bill does not stay proceedings in the original cause, except by order of the court. 2 Barb., Ch. Pr., 135; 2 Dan., 1636. If the cross bill be taken as confessed, it may be used as evidence against the complainants in the original cause on the hearing, and will have the same effect as if he had admitted the same facts in the answer. 2 Barb. Ch. Pr., 185. The cross bill will not delay the hearing of the original cause. 2 Paige, 164; Story's Eq. Pl., § 402. *Griswold v. Simmons*, 137

2. CHANCERY PRACTICE—CROSS BILL—ITS OFFICE.—A cross bill is a proceeding to procure a complete determination of a matter already in litigation. The party as against the complainant in the original bill, is not obliged to show any ground of equity to support the jurisdiction of the court. Story Eq. Pl., § 339. The appearance of a defendant to a cross

bill is enforced in the same manner as to the original bill. 3 Daniels' Ch. Pr., p. 1652. The dismissal of the original bill, as a general rule, would carry with it the cross bill. *Ladner et al. v. Ogden et al.*, 81 Miss., 840. *Thomason v. Neely*, 310

8. **SAME — WAIVER THEREOF.** — If the defendant has neglected for several terms to take out process or prepare the case made in the cross bill, the same may be considered as abandoned at the final hearing for such laches. It is appropriate as against a judgment creditor, who axes in equity to set aside a fraudulent conveyance, to claim in a cross bill that the homestead of the defendant debtor may be assigned by metes and bounds. *Ibid.*

### DAMAGES.

1. **RAILROADS — LIABILITY FOR DAMAGES.** — The rule of law, as established in England and most of the American states, is that a servant accepting employment for the performance of specific duties, takes upon himself the natural and ordinary perils incident to the service which are exposures from the negligence of fellow servants in the same common employments. *N. O., J. and G. N. R. R. Co. v. Hughes*, MSS. Opinion Book D, page 226. *Howd v. Miss. Cent. R. R. Co.*, 178
2. **SAME — LIABILITY TO EMPLOYEES FOR NEGLIGENCE OF FELLOW-SERVANTS.** — The master is not liable for injuries which may happen to a servant in his employment, unless the master is culpable, that is chargeable with negligence or carelessness, either in respect to the act that caused the injury, or in the employment of the person who caused it, or keeping him in service after notice of his unfitness, or after, with the use of proper diligence, he ought to have known it. In order to hold the company responsible to an employee (such as a conductor) for injuries sustained because of the road or its appurtenances being out of repair, it must be shown that the company is in default in its duty, either by the selection of incompetent servants or an insufficient number of them to do the work, or failure to furnish proper materials, or that the company had notice of the bad condition of the road, or is chargeable with negligence for not knowing. *Ibid.*
3. **PRACTICE — BOND OF INDEMNITY — DAMAGES — HOW RECOVERED.** — Where a bond is executed by the plaintiff in execution to indemnify the sheriff against any damage that may accrue to the claimant, the remedy to recover damages sustained by reason of the levy, is on the bond of indemnity, and not in the claimant's issue. Where a levy is made upon personal property, which is claimed by another, who presents an issue to try the right of property, that issue does not involve the question of damages, nor does it preclude the plaintiff from a resort to the

bond of indemnity to the sheriff for damages resulting from the unlawful levy upon the goods. *Shattuck v. Miller*, 886

4. SAME — SAME — SUIT ON THE BOND — PARTIES. — The bond of indemnity imputes to the obligors of the bond the entire responsibility which rested at the common law, upon the sheriff for an illegal levy upon personal property, and is in substitution and bar of a suit against the sheriff, unless the obligors shall be or become insolvent, or the bond would be otherwise invalid, and suit may be brought and maintained against any one or more of the parties on any bond. The justice's court has jurisdiction to render judgment on the bond to the amount of \$150, though the bond may be for a larger sum. *Ibid.*

### DEEDS.

1. UNREGISTERED — NOTICE THEREOF. — It is well settled law in this state that the occupancy and open possession of land under an unregistered deed of conveyance or bond for title, or other contract of sale, imparts notice to creditors and subsequent purchasers, and gives them the same protection as though these written memorials of title had been recorded. Title bonds and other written contracts in relation to land should be acknowledged and recorded as deeds. *Taylor v. Lowenstein*, 278
2. SAME — SAME — LIEN THEREOF. — A prior unrecorded deed is void against a judgment creditor of the grantor, of which he had no notice at the date of his recovery. Subsequently acquired knowledge will not affect the lien which has already attached. A judgment creditor has the right to appropriate the land to satisfy his judgment in preference to the right of the grantee of such debtor whose deed is unrecorded, of which the creditor did not have notice at or before the rendition of the judgment. *Ibid.*
3. DEEDS IN TRUST — REGISTRATION. — A deed in trust, which was not acknowledged although registered, is no notice to third parties, and is a nullity as to all the benefits conferred by the statute upon a properly registered instrument. *Work v. Harper et al.*, 24 Miss., 517; *Tillman v. Cowand*, 12 S. & M., 262. But such an instrument is valid as to all parties who have actual notice of its contents. *Wailles v. Cooper et al.*, 24 Miss., 228. *Bass v. Estill*, 300
4. MARRIED WOMEN — ACKNOWLEDGMENT OF DEEDS — WHAT SUFFICIENT. — The rule generally sanctioned by the courts is, that if the officer taking the acknowledgment discloses a substantial compliance with the law, although the forms and words of the statute are not pursued, it will be good. *Russ v. Wingate*, 30 Miss., 446; *Smith v. Williams*, 38 Miss., 48. The mischief which the statute intended to guard against in requiring a separate

examination of the wife, was the undue influence of the husband, which would be implied in his presence. If the wife was separated from the husband although others might be present, she was in a condition to act freely. *Love et al. v. Taylor et al.*, 26 Miss., 574. *Bernard v. Elder*, 336.

*Ibid.*

5. SAME — CASE IN JUDGMENT. — An acknowledgment showing an examination separate and apart from the husband, and containing the words, "fear threats or compulsion of husband," omitting the words, "as her voluntary act and deed," "freely" is good. *Ibid.*

5. ABSOLUTE DEED — WHEN A MORTGAGE. — It is well settled that an absolute deed will be valid and effectual as a mortgage, if it clearly appear that it was designed as a security for money. And this may be shown to be the intention and effect of the deed by a contemporaneous or subsequent writing, or by an agreement resting in parol. *Prewett v. Dobbs*, 13 S. & M., 440. *Littleworth v. Davis*, 408

DEED, EXCEPTION IN. See EXCEPTION IN DEED.

DE FACTO OFFICER. See OFFICER, 7.

DEMURRER. See CHANCERY PRACTICE.

DESTRUCTION OF PROPERTY. See MARTIAL LAW.

DETAINDER. See UNLAWFUL DETAINER.

DEVISE. See WILL.

### "DUE PROCESS OF LAW."

1. "DUE COURSE OF LAW" — DUE PROCESS OF LAW — LAW OF THE LAND. — These terms do not mean the general body of the law, common and statute, as it was at the time the constitution took effect. For that would deny the right to the legislature to amend or repeal the law. They refer to certain fundamental rights, which that system of jurisprudence of which ours is a derivative has always recognized. *Brown v. Bd of Levee Comm'rs*, 468
2. PRACTICE — JURISDICTION. — It is essential to the validity of a judgment or decree that the court should have jurisdiction. *Ibid.*
3. SAME — JUDGMENT SUITS IN REM. — The "thing" must be subject to the cognizance of the court and amenable to its decree. *Ibid.*
4. JUDGMENT SUITS IN PERSONAM. — The right to adjudicate, so as to conclude the defendant, is conferred by notice actual or constructive, according to a prescribed formula. *Ibid.*
5. POWER OF THE LEGISLATURE OVER PROCESS. — The provision of the bill

of rights "that no person shall be deprived of life, liberty or property, except by due process of law," inhibits the legislature from dispensing with personal service, where it is practicable, and has been usual under the general law. It does not take from the legislature power to amend the law and change the formula of remedies; provided, the fundamental right of personal notice, actual or constructive, in personal suits, is not taken away. *Ibid.*

6. SAME—CASE IN JUDGMENT.—The statute authorizing the suit, prescribing the mode of procedure, and the decree of sale, are condemned as unconstitutional, because it dispenses with personal notice, when the defendants, or many of them, were residents of the county and state and amenable to such process; because the legislature attempted to change a suit, which, according to the "law of the land," was *personal* into a proceeding *in rem* so as to dispense with personal notice; because the defendants had or may have had diverse and independent interests in the land, conflicting with each other and the complainant, and were so numerous that it would be impracticable to unite them in one suit, and adjudicate the numerous collateral controversies that might arise; because the statute and suits under it are unusual, extraordinary and without precedent, legislative or judicial, in the history of the state. *Ibid.*

#### EASEMENT.

1. RIGHT OF WAY—EASEMENT.—A right of way is the privilege which an individual or particular description of individuals have of going over another's grant. It is an incorporeal hereditament of a real nature, entirely different from a common highway. It may be either a right in gross, which is purely a personal right incommunicable to another, or a right appendant or annexed to an estate, and which may pass by assignment with the estate to which it is appurtenant. *Lanier v. Booth*, 410
2. SAME—SAME—MODES OF ACQUIRING EASEMENT.—There are three modes in which easements may be acquired, namely, by express grant, implied grant, and prescription, which presupposes a grant to have existed. The existence of the grant may be established by the production of a deed expressly declaring it, or may be inferred by construction from the terms of an existing deed, or evidence of the grant may be derived from its having been so long enjoyed as to be regarded as proof that a grant was originally made, though no deed is produced which contains it. *Ibid.*
3. SAME—SAME—MODE OF CREATING AN EASEMENT.—An easement may be created, or reserved by an implied grant, when its existence is necessary to the enjoyment of that which is expressly granted or reserved, upon the principle that where one grants anything to another, he thereby

grants him the means of enjoying it, whether expressed or not: thus, if A. sells to B. a parcel of land, surrounded by other lands, and there is no access to the granted premises, but over his own, he gives the purchaser a right of way, by implication, over his own land to that which he has granted. *Ibid.*

4. SAME—SAME—RIGHT OF WAY BY PRESCRIPTION—LENGTH OF TIME REQUIRED.—Originally the time required for gaining a right of way by prescription, began from some time anterior to the memory of man; this was fixed at the commencement of the reign of Richard I. This was open to be rebutted by proof, and to avoid it, the courts adopted a notion of presuming ancient grants, till it became a settled principle of the common law, that such an enjoyment for the term of twenty years raises a legal presumption that the right was originally acquired by title. 2 Washburn on Real Property, 293. *Ibid.*
5. SAME—SAME—THE RIGHT MUST BE EXERCISED ADVERSELY.—It must be adverse to that of the owner of the servient estate, since no length of enjoyment by his permission, and under a recognition of his right to grant or withhold it, at his pleasure, will ripen into an easement. *Ibid.*
6. SAME—SAME—CASE IN JUDGMENT.—Where the case comes within these rules, and the dominant and servient estates are contiguous to each other, and the parties are owners respectively, and that the enjoyment has been notorious, uninterrupted and adverse, the *fee* will be presumed, and the easement will be protected by the court. *Ibid.*

### EJECTMENT.

1. EXCEPTION IN DEED.—Plaintiffs in error conveyed to defendant Annie Lord, by deed, of date October 14, 1861, lots Nos. 3, 4, 5 and 6, in the town of Canton, "except so much of said lot 3 as is now occupied by Owen Van Vocker, Esquire, as an office, being twenty-seven feet front on Liberty street, and running back fifty-six feet;" upon this clause in the deed, rest the right and the title of the plaintiffs. Van Vocker testifies that he was in continuous, open and notorious possession of the property in controversy (without a deed from any one) from 1855 to 1863, when he conveyed it to defendant, Mrs. Annie Lord, who has retained possession continuously thereafter. Plaintiffs rely upon the maxim, "*Si quis rem dat, et partem retinet, illa pars quam retinet, semper eo est, et semper fuit.*" *Moore v. Lords*, 229
2. SAME.—"In every good exception, these things must always concur: 1. The exception must be by apt words. 2. It must be of part of the thing granted, and not of some other thing. 3. It must be a part of the thing only, and not of all, the greater part, or the effect of the thing granted. 4. It must be of such a thing as is severable from the thing

which is granted, and not of an inseparable incident. 5. It must be of such a thing as he that doth except may have, and doth properly belong to him. 6. It must be of a particular thing, out of a general, and not of a particular thing, or a part of a certainty. 7. It must be certainly described and set down." Sheppard's Touchstone, 77. *Ibid.*

3. SAME—CASE IN JUDGMENT.—Of these components of a "good exception," two are noticeable, the second and fifth, unless it can be implied, it does not appear of record that the land sued for was, at the date of the conveyance of 1861, within the meaning of the rule, "a part of the thing granted," nor that it properly belonged to the plaintiffs. *Ibid.*

4. SAME—STRENGTH OF TITLE.—The general rule, that the plaintiff in ejectment must recover upon the strength of his own title, and not on the weakness of that of his adversary, is well understood. When the title of the plaintiff is controverted under the general issue, he must show, that he had the legal estate in the disputed lands, together with the right of entry. He must establish a clear and substantial possessory title, and this rule is firmly established. 2 Bouvier's Institutes, § 3674. And a somewhat close adherence to the ancient landmarks, as understood and explained herein, are deemed essential to the rights of parties, as well as to the due administration of justice. *Ibid.*

5. PLEADINGS IN—RULE AT COMMON LAW.—At the common law the defendant in an action of ejectment was permitted to make defense upon the terms, that he entered into the "consent rule" and pleaded the general issue. No other plea was admissible. *Bernard v. Elder*, 336

6. SAME—RULE UNDER THE STATUTE (CODE 1857, p. 386).—The statute in dispensing with the fictions of the common law, still confined the defendant to the plea of "not guilty" under which he might give "in evidence any lawful defense to the action," but if the defendant shall desire to dispute or deny his possession at the commencement of the action, he must do so by special plea, as the plea of the general issue has the effect of an admission that defendant was in possession at the commencement of the action. *Ibid.*

## ELECTION.

1. NEW COUNTIES.—Art. IV., sec. 37 of Const., and art. V., sec. 13. Under those sections of the constitution empowering the legislature to create new counties, and declaring that all vacancies (in offices) not provided in the constitution, shall be filled in such manner as the legislature may prescribe. The act of the legislature conferring power upon the governor to appoint a chancery clerk for the newly created county, to continue in office until the next general election, is constitutional and valid. *Brady, Dist. Att'y, ex rel. v. West*, 68



2. **SAME.** — Art. IV., sec. 88 of Const. — The appointment of W. by the governor would have been legal, and would have conferred the office upon him, except that W. was a member of the legislature when the bill passed creating the new county. Being such member, he was incompetent under sec. 88, art. IV. of constitution to take and hold the office. *Ibid.*
  3. The act of the legislature under which McC. was elected, has been by this court declared unconstitutional and void. He therefore by his election acquired no right to the office. *Ibid.*
  4. **FEE AND SALARY BILL—VOID.** — The act of the legislature, commonly called the "fee and salary bill," has not the effect of law. Because the bill approved by the governor, as shown by the journals of the two houses of the legislature, is not the bill that passed those bodies. The bill bears upon its face evidence of erasure and interlineations, and the use of figures, without any indication of their value, which makes it unintelligible in many important particulars. *Ibid.*  
*Quare.* — If McCracken was without valid claim, could he call in question the right of West? If not, ought this court to pass upon it? Per **TARBELL, J.** *Ibid.*
  4. **REQUISITE MAJORITY—RULE AT COMMON LAW.** — The rule at common law is, that when the electoral body is indefinite, a majority of the votes cast determines the election. This principle was originally applied to corporations aggregate, to the election of officers, but it has been extended in analogous cases to questions propounded to be adopted or rejected. This rule originated in necessity. *Hawkins v. Carroll Co.*, 735
  5. **SAME—POWER OF THE LEGISLATURE.** — In the absence of any constitutional restrictions, it is competent for the legislature to prescribe the requisite majority to carry a measure of aid, and unless such majority vote for the measure, it fails. *Ibid.*
  6. **MODE OF DETERMINING.** — Unless the law under which the vote is taken intends otherwise, the ballot is the test of the number of electors, and that those who refrain from voting acquiesce in what the majority voting do. This is so because of the insuperable difficulty of getting any other mode. *Ibid.*
- ELIGIBILITY TO OFFICE.** See **OFFICE**, 15.

### EMANCIPATION.

The emancipation of slaves was by a law declaring slavery to have been abolished, etc. The courts must take cognizance of law judicially, and it does not require averment to bring it to their notice. *Irion v. Hume*, 419

**EMPLOYER AND EMPLOYEE** See **RAILROADS**.

EQUITY. See CHANCERY PRACTICE.

EQUITY OF REDEMPTION. See VENDOR'S LIEN.

ESTATE BY CURTESY. See HUSBAND AND WIFE, 14-20.

ESTATE OF DECEDENTS. CLAIMS AGAINST, HOW PROVED. See EVIDENCE, 7.

### ESTATE FOR LIFE.

WHEN CREATED. — The general rule is, that a devise for life with power to dispose of the thing at death is but an estate for life, and it goes, if the devisee or legatee does not dispose of it, to the next of kin of the testator. But if given to one generally — with a general power to dispose of it at his death, then he takes it absolutely. *Jackson v. Robins*, 16 Johns., 537; *Rail et al. v. Dotson et al*, 14 Smed. & Mar., 176; *Dean v. Nunnally*, 36 Miss. Rep., 358. *Tatum, Adm'r, v. McLellan*, 2

ESTOPPEL. See OFFICE, 1-3.

### EVIDENCE.

1. PROOF OF HANDWRITING. — Experts are allowed to testify whether the signature in dispute is by the same hand as another admitted to be genuine. And while comparison of handwriting by the jury is restricted in the English practice to writings put into the case for other purposes, it is allowed in the American states to put in the genuine signatures written before the controversy arose, for the mere purpose of enabling the jury to judge by comparison. *Wilson v. Beauchamp*, 24
2. CONFLICT OF TESTIMONY. — Where there is a conflict in the evidence in case depending on facts, where no legal questions are involved, as in the case under consideration, and where the mind cannot repose with entire confidence and certainty upon a conclusion in favor of either party, the action of the court below will not be disturbed. *Ibid.*
3. PRACTICE — PLEADINGS — NOTICE. — Where an improper notice is attached to a plea of the general issue, the mode of avoiding the special matter proposed to be proved under it is, not by demurrer, but by an objection to the introduction of the testimony. *Wren v. Hoffman*, 41 Miss., 616. *N. O., J. & G. N. R. R. Co. v. Wallace*, 244
4. RECORD — GENERAL RULE. — The general rule is, that a record must be established by the highest attainable evidence. This rule is relaxed in most cases, so that proof may be made by copy. Records are allowed to be shown by the admissions of parties under certain circumstances, but with hesitation and caution. *Phillips v. Cooper*, 722
5. SAME — ADMISSIONS. — Admissions of parties are admissible where there is not, in the judgment of the law, higher and better evidence in existence to be produced. A record cannot be proven by secondary or parol evidence, unless its loss or destruction be shown. *Ibid.*

6. **SAME — AFFIDAVIT AND BOND.** — The recitals of an affidavit and bond do not assert the existence of valid judgments. They merely assert that the executions on their face purport to be issued on certain judgments. These recitals are not admissions made in open court, nor are they solemn admissions made in the course of judicial proceedings, and hence are not admissible to prove a record. *Ibid*
7. **ESTATES OF DECEDENTS — WITNESSES — COMPETENCY THEREOF — CODE 1871, § 758.** — The construction put upon § 758 of the Code of 1871, is that a living party, plaintiff or defendant, in a suit in which the representative of a decedent is a party, is not competent to establish his right or demand against the estate, nor to defeat one, set up by the estate against him. *Lamar v. Williams*, 39 Miss., 347; *Faler v. Jordan*, 44 Miss., 289. *Wood v. Stafford et al.*, 370
8. **LARCENY — PRESUMPTION ARISING FROM RECENT POSSESSION OF STOLEN GOODS.** — No definite length of time, after loss of goods and before possession shown in the accused, seems to be settled, as raising a presumption of guilt. Where the goods are bulky or inconvenient of transmission, or unlikely to be transferred, it seems that a greater lapse of time is allowed to raise the presumption than where they are light or easily passed from hand to hand, and likely to be passed, because in the one case, the goods may not have passed through many hands, and the proof to justify the possession may, therefore, be more simple and easy; but in the latter case, the goods may, very probably, have come to the accused through many persons, and their transit, from the smallness of their nature and value, be much more difficult to be proved. *Roscoe Cr. Ev.*, 18; *3 Greenleaf Ev.*, § 32. *Davis v. State*, 86
9. **PRESUMPTION — STRONG OR WEAK, ACCORDING TO THE FACTS AND CIRCUMSTANCES, AND THE LAPSE OF TIME.** — The possession must be recent after the loss, in order to impute guilt; and this presumption is founded on the manifest reason that, where goods have been taken from one person, and are quickly thereafter found in the possession of another, there is a strong probability that they were taken by the latter. This probability is stronger or weaker in proportion to the period intervening between the taking and the finding, or it may be entirely removed by the lapse of such time, as to render it not improbable that the goods may have been taken by another and passed to the accused, and thus wholly destroy the presumption. *Ibid*
10. **SAME — SATISFACTORY ACCOUNT OF POSSESSION.** — The general rule is undoubtedly well settled, that the possession by a party, of stolen goods, shortly after their loss by the owner, is presumptive evidence of guilt, which, however, may be explained, and if the party in whose possession they are found fails satisfactorily to account for his possession, the pre-

sumption of guilt arises from the recent loss by taking, and the possession will stand and warrant a conviction; what will be sufficient to account for the possession, or to remove the presumption which may arise therefrom, will depend much upon the length of time which intervenes between the loss by the owner and the discovery of possession in the party charged, the nature and character of the goods, and all the circumstances of the case, and this, for the most part, is to be determined by the jury. *Ibid.*

11. **SAME—REASONABLE ACCOUNT OF POSSESSION.**—Where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, it is incumbent on the prosecution to show that the account is false; but if the account given by him be unreasonable or improbable on its face, the *onus* of proving its truth lies on him. *Regina v. Crowhurst*, 1 C. & R. (47 Eng. C. Law R.), 870. The reasonableness of his account must necessarily depend, in a great measure, upon his deportment in relation to the article found in his possession, and upon the time and circumstances under which it was found. *Ibid.*
12. **CONSPIRATORS—ACTS AND DECLARATIONS WHEN EVIDENCE.**—The general rule universally recognized is, that a foundation must first be laid by proof, sufficient *prima facie* to establish the existence of a combination before the acts and declarations of any conspirator or accomplice can be given in evidence to charge others. 1 *Greenleaf's Evid.*, 126; *Browning v. The State*, 80 Miss. Rep., 656. *Garrard v. State*, 147
13. **CONFESSIONS—WHEN ADMISSIBLE.**—The doctrine is well established that when a confession is induced by threats, or by a promise or hope of favor held out to the accused by the magistrate or officer making the arrest, it is inadmissible in evidence against him. 1 *Greenleaf's Evid.*, 258. But where there is a conflict of testimony as to whether the confessions were voluntary, it is a question of fact for the jury to determine. *Ibid.*
14. **SAME—SAME.**—Although the entire confession cannot be received in evidence, the weight of authority is, that so much of the confession as relates strictly to the fact discovered by it, may be given in evidence, for the reason for rejecting involuntary confessions is, the apprehension that the accused may have been induced to say what is false. *Belote v. The State*, 86 Miss. Rep., 96. *Ibid.*
15. **CRIMINAL LAW—PRACTICE—EVIDENCE.**—W. was indicted for the murder of K. Prior to the finding of the indictment, he was tried before a justice of the peace, before whom he made a voluntary statement, which was taken down in writing. On the trial in the circuit court, M., a witness for the state, was permitted to testify to what the accused said in his voluntary statement before the committing magistrate, in opposition

to objections from defendant's counsel. *Heid*, that the admission of the testimony was error. *Wright v. State*, 333

16. **SAME — EVIDENCE — ADMISSIBILITY** — As a general rule, the law requires the production of the best evidence of which the nature of the case in its nature is susceptible. Not the greatest amount of evidence of any fact, but its design is to prevent the introduction of any which, from the case, supposes that better evidence is in possession of the party. As the statute requires that the justice of the peace shall reduce to writing the voluntary confession of the accused, and shall certify and send up the same to the next term of the circuit court of the proper county, the law conclusively presumes that he performed his whole duty. If it be shown that the examination was not reduced to writing, or if the written examination is wholly inadmissible by reason of irregularity, parol evidence is admissible to prove what he voluntarily disclosed. And if it remains uncertain whether it was reduced to writing by the magistrate or not, it will be presumed that he did his duty, and oral evidence will be rejected. *Greenleaf's Ev.*, 259, sec. 227. The written statement should have been produced; the oral evidence of the witness should have been rejected. It was secondary and inferior. *Peter v. The State*, 4 S. & M., 31. *Ibid*.

**EVICTIO.** See **WARRANTY**, 6.

#### EXCEPTION IN DEED.

1. **EJECTMENT.** — Plaintiffs in error conveyed to defendant Annie Lord, by deed, of date October 14, 1861, lots 3, 4, 5 and 6, in the town of Canton, "except so much of said lot 3 as is now occupied by Owen Van Vorter, Esquire, as an office, being twenty-seven feet front on Liberty street, and running back fifty-six feet;" upon this clause in the deed, rest the right and the title of the plaintiffs. Van Vorter testified that he was in continuous, open and notorious possession of the property in controversy (without a deed from any one) from 1855 to 1863, when he conveyed it to defendant, Mrs. Annie Lord, who has retained possession continuously thereafter. Plaintiffs rely upon the maxim, "*Si quis rem dat, et partem retinet, illa pars quam retinet, semper eo est, et semper fuit.*" *Moore v. Lords*, 229.
2. **SAME — SAME.** — "In every good exception, these things must always concur: 1. The exception must be by apt words. 2. It must be of part of the thing granted, and not of some other thing. 3. It must be a part of the thing only, and not of all, the greater part, or the effect of the thing granted. 4. It must be of such a thing as is severable from the thing which is granted, and not of an inseparable incident. 5. It must be of such a thing as he that doth except may have, and doth properly belong to

him. 6. It must be of a particular thing, out of a general, and not of a particular thing, or a part of a certainty. 7. It must be certainly described and set down." Sheppard's Touchstone, 77. *Ibid.*

8. SAME — SAME — CASE IN JUDGMENT. — Of these components of a "good exception," two are noticeable, the second and fifth, unless it can be implied, it does not appear of record that the land sued for was, at the date of the conveyance of 1861, within the meaning of the rule, "a part of the thing granted," nor that it properly belonged to the plaintiffs. *Ibid.*

EXEMPTION. See HOMESTEAD EXEMPTION, FRAUD, 3.

EXTENUATION. See ASSAULT and BATTERY.

FEE SIMPLE. See WILL, ESTATE FOR LIFE.

FEE AND SALARY BILL. See ELECTION.

#### FORCIBLE ENTRY AND UNLAWFUL DETAINER.

1. SPECIAL COURT. — The special court authorized by the statute has its duties, powers and jurisdiction defined and limited by the statute by which it is created, and when a final judgment is rendered in the case for which it is organized, the court is then dissolved. It has no jurisdiction to try any case except forcible entry and unlawful detainer. It has no power to grant a new trial, but may grant appeals when the party applying for the appeal conforms to the requirements of the law. The right to set aside a verdict and grant a new trial is incident to and inherent in all courts of original general common law jurisdiction, such as the circuit courts of this state. The power belongs to them independent of statute. The reverse is the rule as respects inferior and special courts. *Warren v. Trustees African Baptist Church*, 223
2. SAME — APPEAL BOND — CASE IN JUDGMENT. — Where an appeal is taken from the special court and the bond is conditioned that the appellant "shall prosecute said appeal with effect, or in case of failure therein, shall pay and satisfy the amount of said judgment according to the considerations of the said appellate court, and perform and satisfy its judgment," *held*, that this is not sufficient. The condition required by statute is "for the payment of the costs before the said justices, and of all costs that may accrue in the circuit court in case the appellant shall fail therein." "The appeal shall not operate as a supersedeas." *Ibid.*

FORFEITURE. See RECOGNIZANCE.

## FRAUD.

See CHANCERY PRACTICE, 4.

1. It is a maxim in the common law that fraud vitiates every transaction that it taints. Essentially the same principles exist at common law as are declared by the statutes. The fundamental principle is, that the insolvent debtor cannot purchase property for his wife and children so that they may hold it in defiance of his creditors. Such purchases of land, though not within the letter and terms of the statute of frauds, are nevertheless condemned by the common law, and the creditor may pursue the debtor's fund into the property and subject that. *Winn v. Meacham*, 34
2. ADVANCES BY HUSBAND—WHEN VALID.—A debtor may innocently subtract from his resources such means as may be reasonably necessary for the support of his family and the education of his children, which his creditor could not pursue. *Ibid.*
3. HOMESTEAD EXEMPTION.—A fraudulent conveyance does not defeat the homestead. *Wood v. Chambers*, 20 Texas, 247. The title of the exemptionist is dependent on the facts "of his being the head of a family and residing upon the premises." When the occupancy ceases, the right to exemption is lost, and the property is liable to seizure and sale by judgment creditors or by attachment. *Lessly v. Phipps*, 49 Miss., 790. *Ibid.*

## FRAUDULENT CONVEYANCES.

See FRAUD.

1. EFFECT THEREOF.—The statute condemns a fraudulent conveyance to be utterly null and void as to creditors, and they have the same rights against the property embraced in the conveyance as though it never had been made; in effect, the debtor still owns the property, and the creditor may pursue his process for satisfaction as though the title were unembarrassed by the fraudulent deed. *Thomason v. Neely*, 310
2. SAME.—A conveyance made to delay, hinder, or defraud, is only void as to creditors. As to them the title is still in the grantor for the purposes of paying debts. It is good as against the grantor and his heirs. *Shaw v. Millsaps*, 380
3. SAME—BILL TO CANCEL—NECESSARY PARTIES.—The authorities are not agreed as to whether the liens of a fraudulent grantor are necessary parties to a bill to cancel a fraudulent conveyance. *Smith v. Grimm*, 36 Penn. St., 95. *Gaylord v. Kelshaw*, 1 Wallace, 81. Where an answer to a bill is made a cross bill, and asks for the cancellation of a deed, the complainants in the cross bill must confine it to the parties in the original bill. New parties cannot be introduced in a cross bill. *Ibid.*

4. **SAME — CASE IN JUDGMENT.** — M., having a decree against S., was proceeding to sell her land levied upon, when she was enjoined by M. S., who claimed the land by virtue of a conveyance to her from W., trustee, etc., made before the decree was rendered against S. Pending the injunction, S. died. Upon the final hearing M. made her answer a cross bill, and in it prayed for the cancellation of the deed to M. S., as fraudulent. A decree was rendered accordingly. *Held*, that this decree was erroneous, as the proper parties were not before the court to warrant it in cancelling the deed; but the decree should have been, dissolving the injunction and allowing the land to be sold under the former decree. *Ibid.*
5. **VOLUNTARY CONVEYANCE.** — O. being indebted to C., made a voluntary conveyance of land to her son, after which O. brought suit and recovered judgment against O.; the conveyance is shown to be in all things free from fraud in fact, and made in accordance with a previously expressed purpose to make a provision for her son. A bill will be entertained, nevertheless, to vacate the conveyance. The law presumes that a voluntary conveyance, resting upon moral motives, is void as against existing creditors. The donee may show circumstances which repel the presumption, as that the donor was in a prosperous condition, and retained ample means accessible to discharge all obligations. The gift must be reasonable, apparently in no serious degree putting in hazard the right of existing creditors. *Cock v. Oakley*, 628
- See **HUSBAND AND WIFE**, 6, 7.

### GARNISHMENT.

See **ATTACHMENT**, 11-14.

1. **WHEN JUDGMENT AGAINST GARNISHEE.** — In order to condemn the debt to the satisfaction of defendant's indebtedness to his creditors, the plaintiff in attachment must sustain the writ, if controverted, and must also recover judgment for his debt, and not until there has been a recovery against defendant, can a judgment be taken against the garnishee on his answer. *Kellogg v. Freeman*, 127
2. **SAME — JUDGMENT AGAINST DEFENDANT IN ATTACHMENT — EFFECT OF.** — Judgment against garnishee, judicially determines that the garnishee is released from liability to his original creditor, and declared to be debtor to the attaching creditors. By such judgment the debt is transferred by operation of law, and inures to the benefit of the creditors of defendant in attachment suit. *Roberts v. Barry*, 42 Miss. R., 260. *Ibid.*
3. **SAME — CODE 1871, SEC. 1451.** — This statute provides a remedy for a garnishee. It directs that the garnishee shall pay into court the amount of the debt, suggesting that some other person claims title to or an interest in the debt, and causes a citation to issue to such person to appear and



contest with the plaintiff his right. Thereupon the court shall suspend all further proceedings. This mode of procedure is a substitute for the remedy by "interpleader" in equity. *Ibid.*

## GOVERNOR.

### 1. APPROVAL OF LAWS — POWER OF THE GOVERNOR — ACT OF APRIL 25, 1873.

— In the approval of laws the governor is a component part of the legislature, and unless the constitution allows further time, he must exercise his power of approval before the two houses adjourn, or it will be void. Our constitution makes no such provision; therefore the approval of the act of April 25, 1873, by the governor, after the adjournment of the legislature, is a nullity, and the act is void. *Hardee v. Gibbs, Adm'r*, 803

*His Power to appoint Chancellor.* See CHANCELLOR.

GRAND JURY. See JURY.

GROWING CROP. See CHATTEL MORTGAGE, LIEN.

## GUARDIAN AND WARD.

See CHANCERY PRACTICE, 8.

### 1. GUARDIAN AND WARD — FINAL SETTLEMENT — RATE OF INTEREST. —

The guardian must account for interest, where he has consented to take the ward's money as borrower; where he has loaned it out with the sanction of the probate court, or without its permission, or has used it in his own business, or has in any way made profit out of it. So, where he has failed to account for the profits and income of the estate, and thereby prevented a profitable investment of such income. Where funds come to the hands of the guardian after the ward had attained her majority, his powers as statutory guardian had ceased, and the principle as to interest would not apply. But where the guardian files his final account as guardian, according to the statute, and, in such account, includes the funds so collected, then the rule relative to interest must obtain as to such funds. *Garland v. Norman*, 238

2. SAME — SAME. — He cannot be permitted to claim that he can account, on this settlement, for the principal, and settle the interest, if liable, in another form. It was in his hands as a trust fund, and the rule applicable to trustees is, if they neglect for a long time to settle their accounts or to pay over money when they ought to do so, they are liable for the legal rate of interest. *Ibid.*

3. GUARDIAN — WARD — INVESTMENT OF FUNDS THEREOF. — If the money of

a ward is invested in land or other property, the ward may follow the money into the land and elect to treat the land as held in trust for him, or if more to his advantage, can hold the guardian as his debtor for the money. *Pressly, Supt., v. Ellis et al.*, 48 Miss., 582. If the ward elects to take the money, the title to the property becomes absolute in the guardian. *Wood v. Stafford*, 370

4. **SAME—MARRIAGE OF FEMALE GUARDIAN.**—The husband of an executrix by virtue of his wife's appointment, may exercise the powers of an executor. *Edmonson v. Roberts*, 1 How., 329. Marriage with the administratrix confers the same duties and responsibilities. *Wren et al. v. Gayden*, 1 How., 376. The rule must be the same when the female guardian marries. *Ibid.*
5. **SAME—INVESTMENT OF WARD'S MONEY BY HUSBAND OF FEMALE GUARDIAN.**—When the husband of a female guardian invests the money of his wife's ward in land, he becomes a volunteer, and if the ward should elect to proceed against the land, he would occupy no better position than would the guardian had she taken the title to herself. Courts of equity follow the ward's property, whenever wrongfully disposed of, and into whosoever hands it may come, that person will be charged as trustee, if it be shown that he had knowledge of the trust. *Ibid.*
6. **SAME—POWER OF DISPOSITION IN GUARDIAN.**—When the right of disposition is in the guardian, and the purchaser or assignee is not obliged to see to the appropriation of the money, yet if upon the face of the assignment it was to pay a private debt, or for any other improper purpose, contrary to the duty of such fiduciary, a court of equity will relieve. *Ibid.*
7. **SAME—SAME.**—If the trust funds have been invested in property, the *cestui que trust* may claim the beneficial interest in the property; or he may claim an equity upon the property for the money, and a vendee from such purchaser with notice stands as trustee. The trust can be enforced against all persons who come into possession of the property with notice of it. *Adair v. Schaw*, 1 Sch. & Lefr., 262. *Ibid.*

## HOMESTEAD EXEMPTION.

See CROSS BILL, 3.

1. A fraudulent conveyance does not defeat the homestead. *Wood v. Chambers*, 20 Texas, 247. The title of the defendant is dependent on the facts "of his being the head of a family and residing upon the premises." When the occupancy ceases, the right to exemption is lost, and the property is liable to seizure and sale by judgment creditors or by attachment. *Lessly v. Phipps*, 49 Miss., 790. *Winn v. Meacham*, 34

2. **HOW OBTAINED.** — If a debtor occupies property as a residence, and is the head of a family and a householder, such property, to the quantity and value named in the statute, is exempt from "seizure and sale." The law attaches to the ownership of the debtor that immunity. Property liable to levy and sale at the date of the rendition of a judgment can be impressed with the rights of a homestead before either a levy or sale. And it is immaterial how short a time before the sale this is done. *Trotter v. Dobbs et ux.*, 38 Miss., 198. *Irwin v. Lewis*, 363
3. **EQUITABLE RELIEF — INJUNCTION.** — A chancery court has the power to intervene and prevent the sale of real estate under legal process, upon the allegation that such a proceeding would culminate in casting a cloud upon complainant's title. The levy upon the property is one mode of embarrassing the title. *Ibid.*
4. **SAME — SAME — WHEN EXERCISED.** — The test of the right to equitable interposition is not merely that there is a remedy at law, but that remedy must be adequate, as practical and efficient to the ends of justice, as the remedy in equity. *Ibid.*
5. **SAME — SAME — CASE IN JUDGMENT.** — When property claimed as a homestead is threatened with sale under a legal process, a bill in equity, to restrain the sale thereof, is the proper remedy. *Ibid.*
6. **HOMESTEAD EXEMPTION — HOW ACQUIRED — HOW LOST.** — The debtor holds the homestead exempt upon the condition of occupancy as a residence; if abandoned, it is immediately subject to seizure and sale by a judgment creditor. When several separate tracts of land are owned by a debtor, the privilege of making a selection of the homestead does not exist. The law confines it to the parcel upon which the family reside and have their domicil. *Partee v. Stewart*, 717
7. **HUSBAND AND WIFE — AGENCY.** — The husband is not the general agent of the wife and cannot by his acts defeat the wife's interest in real estate, unless thereto authorized or sanctioned by her. Code of 1857, p. 314. *Ibid.*
8. **HOMESTEAD EXEMPTION — CASE IN JUDGMENT.** — The law gives a homestead to every owner of the land, being a householder and head of a family. A married woman, the owner of separate property, and residing upon it as a domicil, with her family, is entitled to claim her homestead exemption. The husband is the head of a family, in the sense that wife and children are subject to his marital and paternal control. But he has no authority and control over the wife's property or the application of it to the support and nurture of the family, unless by her consent. If the land occupied is the domicil of the family, it is her residence with supreme control, except that she cannot mortgage it on a lien without his approbation. *Ibid.*

## HUSBAND AND WIFE.

## See MARRIED WOMEN.

1. **PURCHASE OF LAND—ADVANCEMENT.**—Where the husband purchases land with his own money, and has the deed made to his wife, if she acquires any right in the land, it is by way of advancement, and this will depend upon the intention of the parties at the time of the transaction. The question of advancement under such circumstance, though presumed in the first instance, is a question of pure intention, and, therefore, any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption; and any acts or facts, so immediately after the purchase, as to be fairly considered a part of the transaction, may be received for the same purpose; and this presumption is stronger in favor of a wife than a child, for the reason that she cannot, at law, be trustee of her husband. *Wilson v. Beauchamp*, 24
2. **CONVEYANCE TO HUSBAND AND WIFE—EFFECT THEREOF.**—A conveyance to a husband and wife jointly creates an estate of entirety. It does not make them joint tenants or tenants in common, under the statute. Both are seized of the entirety, and have none of the incidents of cotenancy. Neither can alien without the consent of the other, and the survivor takes the whole. *McDuff v. Beauchamp*, 531
3. **ESTATES OF ENTIRETY—HOW CREATED, ETC.**—A conveyance that would create a joint tenancy in others, makes husband and wife tenants of the entirety. Such estate exists in this state as at common law, and were not abolished by art. 18, Code 1857, p. 309. Such estates are not affected by the statutes for the preservation and protection of the separate estates of married women, and the marital rights therein exist as at common law. As they can be alienated in fee by a joint deed of husband and wife, so they can be incumbered in the same way. *Ibid.*
4. **SEPARATE PROPERTY.**—The husband and wife may occupy towards each other, distinct relations as respects property, and the husband may come under obligations of debt to the wife, as can a stranger. *Simmons v. Thomas*, 43 Miss. R., 31. Nor is it material whether the funds or property appropriated by the husband was with or without the wife's consent. He thereby becomes a creditor which a court of equity will recognize. *Wiley v. Gray*, 36 Miss. R., 510; *Thoms v. Thoms*, 45 Miss. R., 263. *Kaufman v. Whitney*, 103
5. **SAME—VALUABLE CONSIDERATION.**—A charge or mortgage of the wife's property, or a sale of it to exonerate the husband's estate, or to pay his debts, or the consumption of the wife's funds, constitute a valuable consideration to support a conveyance from the husband to the wife. Such

- conveyances when brought into question as fraudulent against creditors, should be tested by the same principles as a conveyance by a debtor to a stranger. *Vertner v. Humphries*, 14 Smed. & Mar., 130; *Roach v. Bennett*, 24 Miss. R., 355. *Ibid.*
6. SAME — ART. 23, CODE 1857. — This statute does not embrace within its provisions conveyances from the husband to the wife, resting upon a valuable consideration. *Ratcliffe v. Dougherty*, 24 Miss. R., 181. *Ibid.*
7. SAME — GENERAL RULE. — The general doctrine of the cases is, that a conveyance made by the husband to the wife directly, if supported by a valuable consideration and pure motives, will in equity be sustained as vesting the estate beneficially in the wife, and will prevail against a creditor. *Ibid.*
8. SAME — STATUTE OF LIMITATIONS. — The 5th section of the act of 1867, continues the claim of the wife against the husband during the coverture and afterwards. *Ibid.*
9. SAME — EFFECT OF ART. — CODE OF 1857, AND ACTS FEB'Y 5, 1867. — These statutory provisions provide a rule to protect a creditor and allow him satisfaction out of the property, although bought with the wife's money or effects; if the possession of the husband induced him to give the credit; also to protect a purchaser for value from the husband, without notice of the wife's equity. *Ibid.*
8. SEPARATE MAINTENANCE. — In England a bill in equity will lie to compel separate maintenance when the wife is turned out of doors, or ill treated, or when the husband has quitted the kingdom without making any provision for the wife. *Garland v. Garland*, 695
9. SAME — SAME — GENERAL RULE IN ENGLAND. — The general rule is, that a bill for maintenance without asking for a divorce could not be maintained in England, yet the chancery courts have seized upon every pretext for taking jurisdiction, with a view to her protection and support. *Ibid.*
10. SAME — SAME — RULE IN AMERICA. — Courts of equity in America will always interpose to redress wrongs when the complainant is without full, adequate and complete remedy at law. Here there is no such process as *supplicavit*, nor a distinct proceeding for the restitution of the conjugal relations. If a wife is abandoned by her husband without means of support, a bill in equity will lie to compel the husband to support the wife without asking for a decree of divorce. *Ibid.*
11. SAME — MAINTENANCE — VESTED RIGHT. — Maintenance is a vested right in the wife founded on the marriage contract, on the confidence reposed in the husband and on the great advantages given the husband over the property of the wife. It arises out of the marriage contract to

support the wife together if they live happily; separate, if unhappy circumstances should separate them without criminality on the part of the wife. This is the legal duty of the husband, and the wife has a right to demand it; but as her remedy when this right is denied is inadequate at law, equity will enforce it. *Ibid.*

12. ART. 17, CHAP. 40, CODE OF 1857.—This statute was not intended to prohibit the courts in a proper case from affording protection to the respective estates of husband and wife, or from providing a separate maintenance for the wife, other than exclusively in proceedings for divorce. *Ibid.*
13. AGENCY.—The husband is not the general agent of the wife and cannot by his acts defeat the wife's interest in real estate, unless thereto authorized or sanctioned by her. Code of 1857, p. 314. *Partee v. Stewart*, 717
14. CURTESY — ITS REQUISITE. — The estate, by the curtesy at the common law, was dependent upon marriage; seizin of the wife of a freehold of inheritance; birth of issue capable of inheriting; survivorship of the husband. *Stewart v. Ross*, 778
15. SAME — RIGHTS OF HUSBAND AT COMMON LAW.— Marriage gave the husband the rents, etc., of the wife's lands, and a seizin with her and in her right; these rights lasted during the coverture. The birth of issue made initiate a life estate, which became vested, was subject to alienation and liable for husband's debts. Being vested, no act of the wife could defeat it, but her estate is reversionary, depending on the life estate. *Ibid.*
16. SAME — SAME. — The husband must have seizin in his wife's right. If, therefore, the husband does not take actual possession, or have the right of immediate possession, which may be exerted by his voluntary act, curtesy does not arise, as if there be a particular freehold estate outstanding, or adverse possession. *Ibid.*
17. SAME — SEPARATE ESTATE OF WIFE UNDER STATUTE. — The statutes declaratory of the property rights of married women, so far as they go, emancipate from marital disability and confer legal rights, capacities and powers. The wife may acquire real estate by purchase, devise or inheritance; she has the exclusive right to the income, may lease her lands and improve them. They are not subject to the debts or contracts of the husband, but are liable for her ante nuptial obligations. These incidents and interests of the wife are inconsistent with the conditions of the curtesy estate at common law. *Ibid.*
18. CURTESY — ARTICLE 28 OF CODE OF 1857 — HOW DEFEATED. — This statute continues the curtesy estate in "all the lands of which the married woman may die seized or possessed." The right of the husband is made contingent upon the seizin of the wife at the time of her death. The estate does not become absolutely fixed and vested in the husband by the

birth of issue. The right only becomes vested when the wife dies seized. It is subject to be defeated by the joint conveyance of husband and wife; by sale under legal process for the wife's debts, and, lastly, by a last will disposing of the estate as allowed by the statute of 1867. *Ibid.*

19. SAME—SAME—TO WHAT IT ATTACHES.—Curtesy attaches, under the statute, to all lands not conveyed by the husband and wife, not sold for her debts, nor devised by last will, or in the words of the statute, to the lands of which she died seized. *Ibid.*

20. SAME—CASE IN JUDGMENT.—Mrs. R. acquired the lands in question in 1870. She made a will, devising them to her children, and died in 1871: *Held*, that the surviving husband did not take an estate by the curtesy. *Ibid.*

INDICTMENT. See CRIMINAL LAW, 1.

INDICTMENT. HOW PRESENTED IN COURT. See CRIMINAL LAW, 11.

INJUNCTION. See HOMESTEAD EXEMPTION.

INJURY TO STOCK. See RAILROADS, 5, 6.

IMPLIED CONTRACT. See CONTRACT, 1, 2.

IMPROVEMENTS, INTERNAL. See CONSTITUTIONAL LAW.

INTERNAL IMPROVEMENTS. See CONSTITUTIONAL LAW.

## INSURANCE

1. MUTUAL PLAN.—Among the features distinguishing such companies from those who insure upon a capital paid up or secured are, that each insurer becomes a member of the association. The capital is composed of premiums earned in the business and deposit notes. The deposit notes constitute the reserved fund, to be used as the necessities of expenses and losses require. The insurers become the mutual indemnifiers of each other against damage and loss from the elements insured against. *Planters' Ins. Co. v. Comfort*, 662
2. SAME—SAME—MODE OF OBTAINING CONTRIBUTIONS.—The mode of obtaining contributions from the makers of deposit notes, is to assess each liable for the loss and expenses with a *pro rata* assessment of a just proportion, and require its payment on due notice. This amount is determined by the directory and must be assessed ratably on the deposit notes of those whose policies were in existence at the date of the loss. Responsibility to contribute to a loss begins when the insurance has been effected, and terminates when the policy expires. *Ibid.*

3. **SAME — SAME — DUTY OF THE COMPANY.** — It is the duty of the company to show before making the assessment, that the loss occurred during the terms of the policies of those assessed, and that all the members under a duty to contribute were assessed; and the company should collect by suit, if necessary, the amount due by delinquents on assessments. *Ibid.*
4. **SAME — SAME — FORFEITURE OF POLICY.** — When an assessment is not made in accordance with the charter upon a deposit note, the failure to pay such an assessment does not work a forfeiture of the policy under the charter. *Ibid.*
5. **SAME — PROOF OF LOSS — CASE IN JUDGMENT.** — The policy requires all insured to make out within thirty days a statement under oath, etc., of the loss. This is a condition precedent to the right of the assured to recover. C., within the required time, notified the company of his loss. The company replied to this, repudiating all liability on the ground of nonpayment of assessment. *Held*, that such an act was a waiver by the company of any further proof of loss by C. *Ibid.*

## INSTRUCTIONS.

See CORPORATIONS, 3. PRACTICE. STATUTE OF LIMITATIONS.

**ORAL.** — It is a violation of the law and the well settled practice and policy of the state, to give oral instructions, on the court's own motion, in civil or criminal cases. Rev. Code 1871, § 643. *Stewart v. State*, 587

**INTEREST.** See GUARDIAN AND WARD, 1.

## JUDGMENT.

1. **PRACTICE — JUSTICE OF PEACE — APPEALS.** — This court upon a writ of error from the circuit court cannot review the proceedings in the case had before a justice of the peace, and correct any irregularity therein. *Prewett v. Nash*, 584
2. **SAME — JUDGMENT — DAMAGES.** — On an appeal from a justice of the peace to the circuit court, if the verdict be for the plaintiff in the original suit, ten per cent. damages shall be included in the judgment, and the judgment should be rendered against the principal and his sureties on the appeal bond jointly. Code of 1871, § 1834. *Ibid.*
3. **LIEN THEREOF ON AFTER-ACQUIRED PROPERTY.** — The lien of a judgment attaches to after acquired property from the time it is acquired by the debtor, but does not relate back to the date of the judgment. The lien of all judgments in existence when the debtor obtains the property



attaches alike. A judgment operates as a lien (if duly enrolled) from the date of its rendition upon all the property owned by the debtor at that time. *Cayce v. Stovall*, 396

JUDGMENT AGAINST SURETIES. See ATTACHMENT, 5-6. PRACTICE. CHANCERY PRACTICE.

JUDGMENT. SUIT IN REM OR PERSONAM. See "DUE PROCESS OF LAW."

### JUDICIAL SALE.

1. PRACTICE — PROCESS — OFFICERS — POWER OF COURT OVER THEM. — The general rule is, that it is inherent power in a court to control its process and officers. When justice demands, it may quash the process or set aside a sale for fraud, made by its officer under a legal process. *Nilson v. Brown*, 23 Mo., 19. But this power is limited to the return term of the writ. After that the remedy is in equity. *Hopton v. Swan*, 545
2. SAME — SAME — PROPER GROUNDS FOR COURT OF LAW TO SET ASIDE A SALE. — Any irregularity of the officer making the sale, or of the plaintiff, or of either party, whereby competition was prevented at the sale, or gross inadequacy of price in connection with other circumstances, will be grounds for setting aside the sale. *Rorer on Jud. Sales*, § 855. *Ibid.*
8. SAME — SAME — HOW SALES SET ASIDE BY A COURT OF LAW. — The party injured can have relief by a summary application to the court under whose authority the officer acts, or through the medium of a court of equity. A motion, to the court from which the process issued, to quash the execution and set aside the sale to the plaintiff, will be sustained in proper cases. Upon the hearing of such motions the court can admit evidence, or if demanded, a jury trial may be had; if not the party will be considered as having waived it. *Ibid.*

### JURISDICTION.

1. JURISDICTION OF SUPREME COURT IN APPEAL OR CERTIORARI FROM JUSTICE OF THE PEACE. — The statute provides that in all cases of appeal from the judgment rendered in the court of a justice of the peace to the circuit court, when the amount in controversy exceeds the sum of fifty dollars, either party shall be entitled to a writ of error from the judgment of the circuit court to the supreme court, as in cases originating in the circuit court. Rev. Code, 1871, § 1334. In cases originating before justices, it is the amount that gives jurisdiction to this court, and that amount must exceed fifty dollars. Appeals and writs of *certiorari* are only different modes of getting cases from the justice's court to the

- circuit court, and do not affect the question of jurisdiction. *O'Leary v. Harris*, 13
2. PRACTICE—JURISDICTION.—It is essential to the validity of a judgment or decree that the court should have jurisdiction. *Brown v. B'd of Lecees Commrs*, 468
3. SAME—JUDGMENT SUITS IN REM.—The "thing" must be subject to the cognizance of the court and amenable to its decree. *Ibid.*
4. JUDGMENT SUITS IN PERSONAM.—The right to adjudicate, so as to conclude the defendant, is conferred by notice actual or constructive, according to a prescribed formula. *Ibid.*
5. PRACTICE—EQUITY—JURISDICTION.—The constitution confers upon the chancery court full jurisdiction of all matters in equity, and equity is defined to be that system of justice which is administered by the high court of chancery in England in the exercise of its extraordinary jurisdiction; but the ordinary branch of that court constitutes no part of the jurisdiction of the court of chancery here. *Smith v. Everett*, 575
6. SAME—ADMINISTRATION OF ESTATES.—In this country, the jurisdiction over the administration of estates of decedents is conferred upon courts of probate, surrogate or orphan's courts, which, in general, possess the powers of the ecclesiastical courts of England upon the subject. Proper means are provided to compel the executors and administrators to collect the assets, to settle proper accounts, and to satisfy the claims of creditors, legatees and distributees. But it sometimes happens that, in order to obtain the relief required, other remedies than those which are incident to the procedure in these tribunals are necessary, in which case a resort to chancery becomes unavoidable. Thus, a bill may be filed by a creditor, to subject to his debts real or personal property fraudulently disposed of by the decedent in his life-time. Or, to follow assets which have passed into the hands of legatees or distributees, where the remedies against the executor or the administrator have been exhausted. And, in some other instances, the equitable remedy has to be invoked, in order to meet cases which cannot be properly dealt with in other tribunals. *Ibid.*

## JURY.

1. CRIMINAL LAW—IMPARTIAL JURY—SEC. 2, ACT OF APRIL 5, 1872.—Among the rights secured to one charged with a criminal offense, by sec. 7, art. 4, of the constitution is, "a speedy and public trial by an impartial jury," etc. Any act of the legislature, which should encroach upon the qualifications of jurors, in such wise, as to endanger their impartiality, would be an infringement of this constitutional privilege. *Quære*. Is sec. 2 of the act of April 5, 1872, constitutional? *Logan v. State*, 269.

2. SAME—SAME—EXTENT THEREOF.—The extent of the privilege is, that each member of the panel shall be indifferent and impartial; in that state of mind, unbiassed by a pre-opinion or prejudice, which would or might interfere with the just influence of the testimony on the mind.  
*Ibid.*
3. SAME—SAME—RULE IN THIS STATE.—The rule in this state is, that if the mind of the juror is so far prejudiced as to require testimony to annul pre-opinion derived from any source or origin; or if the opinion has been engendered from personal knowledge, from hearing the witnesses, on a former trial, although the juror may disclaim that it would influence his verdict and claim that he was unbiassed, he would be an incompetent juror. But if the opinion is formed from rumor, and upon investigation, shall be shown not to be fixed so as to create a bias or prejudice which would require testimony to remove, such person is a competent juror.  
*Ibid.*
4. IMPANELING A GRAND JURY—SPECIAL VENIRE—WAIVER THEREOF.—After a grand jury has been sworn and impaneled, exceptions cannot be taken to an individual member thereof. Code of 1871, § 729. When a party goes to trial, without service of the special venire, he will be taken to have waived it. *Head v. The State*, 44 Miss., 749; *Durrah v. The State*, ib., 795.  
*Ibid.*

### JUSTICE'S COURT.

#### See JURISDICTION. CERTIORARI.

1. NEW TRIAL BY JUSTICE'S COURT—Where the attachment is sued out and levied, and a third party claims the goods, and tenders an issue, and upon that issue the jury found for the defendant, and the justice of the peace sets aside the verdict and grants a new trial: *held*, that the justice had no power to set aside the verdict and grant a new trial; and even if that court possessed such power, it is not such a judgment as could be removed to the circuit court by appeal or *certiorari*, being only an interlocutory order in the progress of the cause. Where there is a verdict in a justice's court in a case in which he has jurisdiction, it is his duty to enter judgment on such verdict, and his and his action in setting aside the verdict and granting a new trial is simply void, and could furnish no grounds for carrying the case to the circuit court, and the circuit court would have no power to retain the suit and try it. *Morris v. Shyrock*, 590

### JUSTICE OF THE PEACE.

#### See APPEAL. CERTIORARI, JURISDICTION.

1. JUSTICE OF THE PEACE—COUNTY COURT LAW.—The act of the legislature of July 11, 1870, abolishing the county courts, provides that all suits

then pending in said county courts, when the principal of the amount in controversy does not exceed \$150, shall be transferred to any justice's court at the county seat of the county in which such suit is pending. Where suit was brought in the county court, and transferred to a justice's court at the county seat, which court gave judgment for plaintiff, who appealed to the circuit court. It was error in the circuit court to dismiss the case for want of jurisdiction in the justice court. *Moore v. Dunn*, 33

## LANDLORD AND TENANT.

See CHATTEL MORTGAGE, 5-7. LIEN, 2-4.

1. **WHEN RELATION EXISTS.**—It is well settled that there may be a letting of land from year to year or for one year. Where the relation of landlord and tenant exists, though the rent is to be paid in part of the product, it is equally well settled, that one may cultivate the land of another for the purpose of making a crop, which is to be divided between the landowner and the cultivator, where the parties would be tenants in common of the crop and not landlord and tenant. Whether the contract be of one kind or the other depends on the intention of the parties, to be gathered from all the attending circumstances. *Betts v. Ratliff*, 561
2. Where the tenant continues to occupy, and enters upon another year without objection from the landlord and with his silence or tacit consent and approval, a tenancy for another year is thus created, and cannot be terminated in the middle of the term, and in the midst of the crop, but only at the end of the year. Rev. Code, 1871, §§ 1640-1646. *Usher v. Moss*, 208
3. **CASE IN JUDGMENT.**—The jurisdiction conferred on justices of the peace, by Rev. Code, 1871, § 1646, under which the proceeding at bar was instituted, is held to be special, as contradistinguished from the jurisdiction given by the constitution, and therefore not necessarily embraced within the constitutional provision. But the right of appeal given by the constitution is thereby "secured under such rules and regulations as shall be prescribed by law." The judgment of the circuit court is obtained in the cases arising between landlord and tenant before a justice of the peace by *certiorari* awarded by the circuit court and in no other way Rev. Code, 1871, § 1660. And it is not error in the circuit court in such cases to dismiss an appeal. *Ibid.*
4. **LIEN — MORTGAGE — LANDLORD AND TENANT — ACT OF APRIL 17TH, 1873.**—Neither at common law nor under the statutes, prior to the act of April 17th, 1873, had the landlord a lien upon the agricultural products or the chattels on the premises for his rent. *Arbuckle v. Nelms*, 556
5. **LIEN OF ACT OF APRIL 17TH, 1873.**—This act confers a lien on the land-

lord, so as to place his rent in kind beyond the power of the tenant for any debt contracted by him. It was designed to give a security on the crop itself, so that it could not be incumbered to the prejudice of the interest of the landlord. *Ibid.*

6. **SAME.**—A lien upon a crop, created by the act of April 17, 1873, although declared to be a "first lien," is subordinate and inferior to a mortgage or conveyance in trust of the crop previously given. This lien attaches for the benefit of those who cultivate the crop, and are entitled to a share thereof, and also for the landlord's rent, from the date of the passage of the act, as between the parties immediately interested. But not so as to impair any specific incumbrance or lien placed upon the crop before the act went into effect.
7. **SAME—CASE IN JUDGMENT.**—N. Leased to K., on the first of January, 1873, thirty acres of land, for that year, the rent to be paid in cotton. On the 31st of May, 1873, K. executed a mortgage on his crop to A., for supplies, etc. *Held*, that as the mortgage was not executed until after the passage of the act of April 17th, 1873, it was subordinate to the lien of the landlord created by the act. *Ibid.*

**LARCENY.** See **CRIMINAL LAW**, 3-7.

## LIEN.

1. **MORTGAGE—LANDLORD AND TENANT—ACT OF 17TH APRIL, 1873.**—Neither at common law, nor under the statutes, prior to the act of 17th April, 1873, had the landlord a lien upon the agricultural products or the chattels on the premises for his rent. *Arbuckle v. Nelms*, 565
2. **LANDLORD AND TENANT—LIEN OF ACT OF 17TH APRIL, 1873.**—This act confers a lien on the landlord, so as to place his rent in kind beyond the power of the tenant for any debt contracted by him. It was designed to give a security on the crop itself, so that it could not be incumbered to the prejudice of the interest of the landlord. *Ibid.*
3. **SAME—SAME.**—A lien upon a crop, created by the act of April 17, 1873, although declared to be a "first lien," is subordinate and inferior to a mortgage or conveyance in trust of the crop previously given. This lien attaches for the benefit of those who cultivate the crop, and are entitled to a share thereof, and also for the landlord's rent, from the date of the passage of the act, as between the parties immediately interested. But not so as to impair any specific incumbrance or lien placed upon the crop before the act went into effect. *Ibid.*
4. **SAME—CASE IN JUDGMENT.**—N. leased to K., on the first of January 1873, thirty acres of land, for that year, the rent to be paid in cotton. On

the 31st of May, 1873, K. executed a mortgage on his crop to A., for supplies, etc. *Held*, that as the mortgage was not executed until after the passage of the act of 17th April, 1873, it was subordinate to the lien of the landlord created by the act. *Ibid.*

LIEN FOR LABOR. See MORTGAGE, 2.

### LIMITATION OF ACTIONS.

1. REVIVOR OF JUDGMENT AGAINST AN ADMINISTRATOR, DEBONIS NON.—P. recovered judgment against A., November 13, 1860. A. died November 4, 1865. K. was appointed administrator of the estate of A., June 6, 1866. K. died, and E. was appointed administrator *de bonis non*, November 2, 1871, *scire facias* to revive the judgment in favor of P., April 12, 1873; *held*, that the action was barred by the statute of limitations. When the statute of limitations is once put in motion, it is not arrested by any subsequent disability; this is the rule, but if the disability is of a temporary character, growing out of a positive statutory provision, the time of such temporary disability should be excluded. In a *scire facias* to revive a judgment, the object is to make a new party to the judgment, and charge him with the duty of making satisfaction and he cannot set up any defense which existed anterior to the original judgment, and which might have been pleaded in bar of the original action. *Pollard v. Eckford*, 631
2. SCIRE FACIAS—REVIVOR OF JUDGMENT—STATUTE OF LIMITATIONS.—Where R. P. recovered judgment against J., et al., on the 5th day of March, 1867. The plaintiff died, and J. D. P. became the administrator, and sued out a writ of *scire facias* to revive the judgment on the 5th day of August, 1874. *Held*, that the action was barred by the statute of limitations of seven years. Code of 1857, art. 8, page 400; Code of 1871, § 2153. No execution having issued on the judgment, had the plaintiff been living at the time of the issuance of the *scire facias*, he could not have revived the judgment. The administrator does not stand in a better attitude. *Palmer v. Jones*, 657
3. PRACTICE—STATUTE OF LIMITATIONS.—J. & P. brought an action of assumpsit against D. for \$400, attorneys' fee. D. interposed the statute of limitations. D., with his family, left for Europe in the spring of 1870, and returned in the fall of the same year. Deducing the period of his absence, and the claim was not barred; otherwise, it was barred. He had left his home and furniture. The plaintiffs testified, that on the return of D., they demanded \$250 for their services, for which the suit is brought for \$400. These questions were presented for the consideration of the jury: 1. Should the period of D.'s absence be deducted, or could he

have been legally served with summons during that period? 2. Whether by the demand of \$250, J. & P. intended to fix the value of their services at that sum? *Dent v. Pintard*, 265

4. SAME—INSTRUCTIONS.—The court instructed the jury: "If the jury believe that D. had a home here, with his furniture at such home, but went abroad for his health, and remained in Ireland from April, 1870, until November, 1870, then the jury may find that such absence from Mississippi in Ireland, was an actual residence there for the time above stated; and, if they so find, they are then authorized by the law to deduct said time from the statute of limitations, and find for the plaintiffs." *Held*, that this was error. Rev. Code, 1857, 489; art. 64, Rev. Code of 1871, § 701; *French v. Davis*, 88 Miss., 218-25; *Ingersoll v. Morse*, 33 ib., 697. *Ibid*.

"LAW OF THE LAND." See DUE PROCESS OF LAW.

LEASE. See LANDLORD AND TENANT.

LEGISLATURE. *Its Power over Process*. See DUE PROCESS OF LAW. *Its Power over Vested Rights*. See REPEAL OF STATUTES, 4.

LICENSE TO SELL LIQUORS. See MANDAMUS.

LIEN. See CHATTEL MORTGAGE, 1. JUDGMENT, 1. LANDLORD AND TENANT. MECHANIC'S LIEN, 1, 2. MORTGAGE. VENDOR'S LIEN, 1, 2. WILL, 6.

MAINTENANCE. See HUSBAND AND WIFE, 8-12.

### MANDAMUS.

1. WHEN THE ACTION WILL LIE.—Where a discretion is left to an inferior tribunal, the writ of *mandamus* can only compel it to act, but cannot control the discretion. The writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. Being regarded as one of the highest writs known to our jurisprudence, it can only be invoked when there is a clear specific legal right, and a duty which can be performed, and there is no other specific and adequate legal remedy. *State Bd of Education v. West Point*, 636
2. SAME—CASE IN JUDGMENT.—The city of West Point collected large sums of money from the sale of licenses to retail vinous and spirituous liquors, and used the same for the ordinary purposes of the city government: *Held*, that this money should have been paid into the state treasury as a permanent school fund. Const., art. 8, sec. 6. If the amount of indebtedness by the city authorities be uncertain and unliquidated, the writ of *mandamus* will not lie to compel the levy of a tax to pay the debt. The creditor should first obtain his judgment, and then

if there is no money in the treasury out of which his judgment can be paid, he may ask for a *mandamus* to compel the board to levy a tax to pay off his judgment, unless there be some special statute providing another remedy. *Ibid.*

3. PLEADING AND PRACTICE—MANDAMUS.—The petition for the writ of *mandamus* is an *ex parte* application to the court, and constitutes no part of the pleadings. It should present a *prima facie* right on the part of the relator and of duty and obligation to perform the act demanded on the part of the defendant. It should be verified by affidavit, otherwise the alternate writ should not be granted. It should also appear that a demand had been made, and a refusal or neglect to comply. *Hurdee v. Gibbs, Adm'r.*, ) 802

4. SAME—RULE AT COMMON LAW.—At common law a writ of error would not lie to the judgment of an inferior court awarding or refusing an alternate *mandamus*, or in awarding or refusing a peremptory *mandamus*. But the practice is otherwise in this country, and the awarding or refusing the writ is not a matter of mere discretion. *Ibid.*

MARRIAGE OF FEMALE GUARDIAN CONFERS GUARDIANSHIP ON HUSBAND.  
See GUARDIAN AND WARD.

MARSHALLING ASSETS. See PARTNERSHIP.

#### MARTIAL LAW.

1. MILITARY ORDERS—DESTRUCTION OF PROPERTY.—About the close of the late war, and after the surrender of the confederate forces, east of the Mississippi River, General Tucker, commanding a district including the city of Jackson, issued a military order, directing defendant Green, commanding a militia company, to destroy all the spirituous liquor in the city of Jackson. Under said order the liquor of plaintiff was destroyed. M. sued G. and others for the value of the property. The defendant sets up this military order in justification, and insists that the order was necessary as a means of protecting the city of Jackson from destruction by drunken soldiers, who had been paroled, and were threatening to burn the town, and were searching for spirituous liquor. *Held*, that it is subversive of all civil rights, and places the civil authorities in absolute subordination to the military, to instruct the jury, to the effect, that a military officer in command of a district, has power to deal with private property, and may, if in his judgment it is fit and proper, order it to be destroyed, and that those who obey are protected by the order. *McLaughlin v. Green.* 453
2. MARTIAL LAW—WHEN IT OBTAINS, AND WHEN IT CEASES.—In defining



when martial law may rightfully obtain, it is limited to the theatre of active military operations, when no civil authority remains, and there is a necessity to furnish a substitute to preserve the safety of the army and society, and martial rule can only prevail until the laws can have their free course. General Tucker being in command, with head quarters at Jackson, did not supersede the civil authorities, state or municipal, within the scope of his command. His duties were purely military, without right to interfere with private citizens or their property, except within the limits here defined. *Ibid.*

### MARRIED WOMEN.

#### See ACKNOWLEDGMENT OF DEEDS. HUSBAND AND WIFE.

1. **CONTRACTS OF.**—An obligation or promise to pay for property, bought on a credit, by a married woman, is not embraced in that class of contracts mentioned in the statute, and is not enforceable out of her separate estate. Code, 1857, art. 25. If such a liability is incurred, the wife may set up her disability as absolving her from it, which is a defense against the debt and any security which may accompany it. *Whitworth v. Carter*, 43 Miss. R., 72. *Nicholson, Ex'r, v. Heiderhoff*, 56
2. **SAME — ELECTION TO RECEDE FROM CONTRACT.**—Where a married woman buys property on credit, she has her election either to recede from the bargain and claim its annulment, or allow it to stand with a right in the vendor to subject the property to the payment of the debt; beyond that the vendor could not go, and coerce payment out of her other property. But she cannot retain possession of the legal title and plead her disability in annulment of her obligation and security for the purchase money. *Gordon v. Manning*, 44 Miss. R., 756. *Ibid.*
3. **SAME — SALE TO A MARRIED WOMAN ON CREDIT.**—The sale and conveyance of property to a married woman on credit is a voidable contract on her part. She may make the payments, whereby the act becomes complete and executed. If the vendor seeks relief in equity, or any security reserved or made by her, the decree will be framed so as to conform to the election she may make in her answer. If a married woman sells and conveys property bought on a credit, her alienee cannot defeat the liens which the vendor has taken, on the allegation that his vendee was covert. Such alienation would be taken as a conclusive waiver of the privilege of disability, and the incumbrances which were voidable as to her, become conclusive upon her vendee. *Ibid.*
4. **SEPARATE PROPERTY — MORTGAGES THEREOF.**—It is well settled in this state that the power of a married woman to mortgage her separate estate is limited to securing those debts which she is permitted, under

the statute, to incur, and for the separate debts of her husband; but, in this case, only to the extent of the income. *Viser v. Scruggs*, 49 Miss., 713. A mortgage on the wife's separate property to secure a note made by husband and wife, is valid as to the income, under § 28, Code 1857, p. 836. *McDuff v. Beauchamp*, 531

5. CONVEYANCE TO HUSBAND AND WIFE — EFFECT THEREOF. — A conveyance to a husband and wife jointly creates an estate of entirety. It does not make them joint tenants or tenants in common, under the statute. Both are seized of the entirety, and have none of the incidents of co-tenancy. Neither can alien without the consent of the other, and the survivor takes the whole. *Ibid.*

6. ESTATES OF ENTIRETY — HOW CREATED, ETC. — A conveyance that would create a joint tenancy in others, makes husband and wife tenants of the entirety. Such estates exist in this state as at common law, and were not abolished by art. 18, Code 1857, p. 809. Such estates are not affected by the statutes for the preservation and protection of the separate estates of married women, and the marital rights therein exist as at common law. As they can be alienated in fee by a joint deed of husband and wife, so they can be incumbered in the same way. *Ibid.*

MASTER AND SERVANT. See RAILROADS, 1, 2.

## MECHANIC'S LIEN.

See LIEN.

1. TO WHAT IT EXTENDS. — Such liens extend to and take hold of the freehold, if such was the nature of the estate, and is superior to subsequent incumbrances. *Otly v. Haviland, Clark & Co.*, 86 Miss. R., 37; *McLaughlin v. Greene*, 48 Miss., 203. If there be a prior incumbrance, the lien will be operative on the buildings and erections, but not upon the land itself. *Buchanan v. Smith & Barksdale*, 43 Miss., 90. *Ivey v. White*, 143
2. SAME — ITS BEGINNING — RIGHTS OF PURCHASERS UNDER IT. — Such liens begin either from the date of the contract or from the commencement of the work on the ground towards the erection of the buildings. *Bell v. Cooper*, 26 Miss. R., 650. The purchaser, under such special judgments, acquires the privileges and benefits of the lien, and his title relates back to the lien, and is invested with its advantages, so as to defeat incumbrances and conveyances made by the judgment debtor subsequent thereto. *Cochran v. Wimberly*, 44 Miss., 505; *Lambert v. Elder*, 44 Miss., 88. *Ibid.*
3. SAME — CLAIM OF WIFE. — Where the legal title is in the husband, and

he incumbers it for its improvement, without notice to the mechanic of the wife's claim, and there was an actual sale under judgment for a debt due the mechanic to one who bought without notice, and conveyed to his vendee, also without notice. Against these parties the secret resulting trusts, if proven, could not be set up. *Boon v. Barnes*, 23 Miss. Rep., 188. *Ibid.*

**MILITARY ORDERS.** See **MARTIAL LAW.**

**MISNOMER.** See **CRIMINAL LAW**, 1.

### MORTGAGE.

1. **ABSOLUTE DEED — WHEN A MORTGAGE.** — It is well settled that an absolute deed will be valid and effectual as a mortgage, if it clearly appear that it was designed as a security for money. And this may be shown to be the intention and effect of the deed, by a contemporaneous or subsequent writing, or by an agreement resting in parol. *Prewett v. Dobbs*, 12 S. & M., 440. *Littleworth v. Davis*, 408
2. **MORTGAGE — BY LESSEE FOR SUPPLIES — LIEN FOR LABOR.** — The act of April 5, 1872, gives a "first lien in law" upon all agricultural products to secure payment of the wages of the laborer, whether to be paid in money or in products. It operates against the landlords and all other persons interested in such products. It takes effect as a limitation or restriction upon the power of the employer, by contract, mortgage or other act, to defeat this first lien created by law, to secure to the laborer his wages, out of the fruits of his industry, and the employer can create no other lien that will be paramount to it. A mortgage executed after the passage of this act is subordinate to the right of the mortgagor to employ laborers, and thereby by operation of law create the lien in their behalf, although such employment might be subsequent to the date of the mortgage. The act of February 18, 1867, was in force, until repealed in October, 1878. *Buck v. Paine*, 648
3. **SAME — SAME — PURCHASE FOR VALUE WITHOUT NOTICE.** — Whatever will put a party upon inquiry, which if pressed with ordinary diligence and understanding, would lead to knowledge of the requisite fact, is notice of it. A subsequent purchaser or creditor about to deal with the property, if they have notice of a prior claim or equity, or of facts, which if followed up, will discover the truth, are put under a duty to make the investigation, and if they fail to do so, are charged with knowledge which the inquiry would have disclosed. *Ibid.*

**MORTGAGE, CHATTEL.** See **CHATTEL MORTGAGE.**

**MOTION AGAINST SHERIFF.** See **SHERIFF.**

**MULTIFARIOUSNESS.** See **CHANCERY PRACTICE, 1.**

**MUNICIPAL CORPORATIONS.** *Their right to aid in building of Railroads.* See **CONSTITUTIONAL LAW.**

**MUTUAL PLAN OF INSURANCE.** See **INSURANCE.**

## NEGLIGENCE.

**1. RAILROADS—LIABILITY FOR DAMAGES.**—The rule of law, as established in England and most of the American states, is that a servant accepting employment for the performance of specific duties, takes upon himself the natural and ordinary perils incident to the service, which are exposures from the negligence of fellow servants in the same common employments. *N. O., J. and G. N. R. R. Co. v. Hughes*, MSS. Opinion Book D, page 226. *Howd v. Miss. Cent. R. R. Co.*, 178

**2. SAME—LIABILITY TO EMPLOYEES FOR NEGLIGENCE OF FELLOW-SERVANTS.**—The master is not liable for injuries which may happen to a servant in his employment, unless the master is culpable, that is chargeable with negligence or carelessness, either in respect to the act that caused the injury, or in the employment of the person who caused it, or keeping him in service after notice of his unfitness, or after, with the use of proper diligence, he ought to have known it. In order to hold the company responsible to an employee (such as a conductor) for injuries sustained because of the road or its appurtenances being out of repair, it must be shown that the company is in default in its duty, either by the selection of incompetent servants or an insufficient number of them to do the work, or failure to furnish proper materials, or that the company had notice of the bad condition of the road, or is chargeable with negligence for not knowing. *Ibid.*

**NEW COUNTIES.** See **ELECTION.**

## NEW TRIAL.

**1. NEW TRIALS.**—It is well settled that a new trial will not be granted for the admission of illegal evidence, to establish a fact which is sufficiently proven by other competent evidence; nor if it appears that, on another trial, a different result would not ensue, and it is manifest that justice has been done. Nor because erroneous instructions have been granted, if the verdict be clearly right according to the evidence. *Pritchard v. Myers*, 11 Smed. & Mar. R., 169; *Hand v. Grant*, 5 Smed. & Mar. R., 508. *Garrard v. State*, 147

NEW TRIAL BY JUSTICE COURT. See JUSTICE'S COURT.

NON EST FACTUM. PLEA OF. See PRACTICE, 1.

NOTICE OF LIEN. See MORTGAGE, 3.

## OFFICE AND OFFICERS.

See SUPERINTENDENT OF EDUCATION.

1. OFFICE—CONTEST FOR OFFICE OF CHANCERY CLERK—ESTOPPEL *in pais*.—To establish estoppel *in pais* there must be:
  1. An admission inconsistent with the evidence offered to be given, or the claim offered to be set up.
  2. Action by the other party upon such admission.
  3. Injury to him by allowing the claim to be disproved. 14 Mo., 482. *Turnipseed v. Hudson*, 430
2. SAME—ABANDONMENT—SURRENDER.—T. was elected clerk of the chancery court of Winston county in 1871, for the term of four years. The act of April 21, 1873, provided for an election to fill said office in November, 1878 (afterwards decided to be unconstitutional); previous to which election H. and others became candidates for the office at said election. T. was also a candidate for reelection. They entered into an agreement in writing, to abide the result of a primary election, to which their respective claims were to be submitted, and the successful party, to be supported by the defeated aspirants. At the primary election, H. was selected, and in November, 1873, he was elected to the office. In January, 1874, he qualified and took possession of the office, T. surrendering the same. Subsequently the election was decided to be void, and T. brought suit to recover the possession of the office. Held, that the surrender of the the office by T. did not amount to such an abandonment of the office as to amount to an estoppel *in pais*. *Ibid.*
3. SAME—SAME.—In order to an estoppel by conduct, the following elements must be present:
  1. There must have been a *representation* or a *concealment* of material facts.
  2. The representation must have been made with *knowledge* of the fact.
  3. The party to whom it was made must have been *ignorant of the truth* of the matter.
  4. It must have been made with the *intention* that the other party should act upon it.
  5. The other party must have been *induced to act upon it*. If there is an estoppel, it cannot be by judgment or record, of adjudication nor by matter of deed, but must be by matter *in pais*, of which estoppel by conduct is the key. Bigelow on Estoppel, 473-480. *Ibid.*

4. SAME — TRANSFER OF OFFICE FROM ONE TO ANOTHER — If an office may be transferred from one to another, in the mode attempted, no elucidation is necessary to expose the evils which might flow from repeated changes, which the sanction of the claim of the respondent, to the extent required, would render possible. 37 N. Y., 317; 4 N. Y., 449; 3 Kent's Com., 588, top p. 11 ed., part 6 (of officers). *Ibid.*
5. SAME — VACANCY — HOW CREATED. — If a state or county officer is found to be an idiot, lunatic, or of unsound mind, or guilty of a felony or infamous crime, corruption or peculation in office, gambling with public money, he shall be removed from office. Rev. Code 1871, § 392. If any state, district or county officer shall remove out of the state, county or district for which he was elected, the office shall thereby become vacant. Rev. Code 1871, § 393. And the board of supervisors have the power to order elections to fill vacancies in county offices. Rev. Code 1871, § 1373. *Ibid.*
6. SAME — CASE IN JUDGMENT. — In order to create a vacancy, the party holding the office must permanently disable himself from performing the duties of the office, by himself or deputy, or he must, by act or declaration, manifest a clear intention to willfully abandon the office and its duties. *Ibid.*
7. OFFICE — ABANDONMENT THEREOF — ESTOPPEL — Where an officer abandons an office voluntarily, and another enters upon its duties under color of right, such a one is a *de facto* officer, and can only be ousted by the judgment of a court at the suit of the state. Such abandonment amounts to a resignation of the office, and the party is estopped from setting up any claim to the office. *Alexander v. Walter*, 8 Gill, 253; *Colton v. Beardsley*, 38 Barb., 45. Per SIMRALL, J. *Ibid.*
8. PRACTICE — PROCESS — OFFICERS — POWER OF COURT OVER THEM. — The general rule is, that it is inherent power in a court to control its process and officers. When justice demands, it may quash the process or set aside a sale for fraud, made by its officer under a legal process. *Nilson v. Brown*, 23 Mo., 19. But this power is limited to the return term of the writ. After that the remedy is in equity. *Hopton v. Swan*, 545
9. SAME — SAME — PROPER GROUNDS FOR COURT OF LAW TO SET ASIDE A SALE. — Any irregularity of the officer making the sale, or of the plaintiff, or of either party, whereby competition was prevented at the sale, or gross inadequacy of price in connection with other circumstances, will be grounds for setting aside the sale. *Rorer on Jud. Sales*, § 855. *Ibid.*
10. SAME — SAME — HOW SALES SET ASIDE BY A COURT OF LAW. — The party injured can have relief by a summary application to the court under whose authority the officer acts, or through the medium of a court of

equity. A motion, to the court from which the process issued, to quash the execution and set aside the sale to the plaintiff, will be sustained in proper cases. Upon the hearing of such motions the court can admit evidence, or if demanded, a jury trial may be had, if not, the party will be considered as having waived it. *Ibid.*

11. **SAME—RIGHT OF REVIVOR AGAINST OFFICER.**—A suit by or against an officer may be revived by or against the successor. Such is regarded as a proceeding against the officer, and not against an individual. The responsibility results from the office and not from any individual responsibility of the person occupying it. Such a rule is essential to the administration of justice. *Hardee v. Gibbs, Adm'r.*, 802
12. **SUITS BY OFFICERS—REVIVAL THEREOF.**—Although there is no statute in this state authorizing a suit brought by an officer to be prosecuted in the name of his successor, yet it has long been the practice in this state to allow it. A change in the incumbent of an office, pending the suit, does not abate the suit and make it necessary to begin *de novo*, if the successors are charged with the same duties. *McDuff v. Beauchamp*, 531
13. **OFFICERS—ESTOPPEL.**—An officer in possession of an office, exercising its functions and enjoying its emoluments, is estopped from denying his title or right to the office as justification for malfeasance or misfeasance in office. Nor can the sureties on his official bond set up such a defense when called upon to make good any default, etc. *Byrnes v. State*, 688
14. **SAME—APPOINTMENT OF A CLERK.**—It pertains to a chancellor to appoint a clerk, under certain circumstances, and when these circumstances exist, a *de facto* chancellor exerts the power with the same right that he may render a decree, or punish for contempt. The statute makes provisions for the chancellor to make an *ad interim* appointment of clerk until the office can be filled by an election, but it would be a palpable evasion of the constitution, if the board of supervisors should refrain from ordering an election to the end that such an appointee might enjoy the residue of the time of his predecessor. The legislature could not provide for the filling a vacancy that happens by casualty, otherwise than by an election. The statute does not authorize the chancellor to fill the office for the balance of the term; he can assign a person to discharge the duties of the office until an election can be held. *Brady Dist. Att'y ex rel. v. Howe*, 607
15. **SAME—ELIGIBILITY TO OFFICE—PERSONS LIABLE FOR PUBLIC MONEYS UNACCOUNTED FOR—CONST., ART. 4, SEC. 16.**—No person liable for public moneys unaccounted for shall be eligible to any office of profit or trust until he shall have accounted for and paid over the same. C., chancellor, appointed H. clerk of the chancery court of Panola county; a petition was filed against H. in the nature of *quo warranto*, alleging that

he was liable for public moneys; that he did receive large sums of money as treasurer of Panola county, for which he has not accounted and paid over, but still is liable therefor. He insisted that the default must have been judicially ascertained and fixed before the liability accrues: *held*, that this was not essential; that the question of his liability for moneys unaccounted for can be inquired into as fully and as thoroughly in a proceeding in *quo warranto* as in any form of civil action, or as in the trial of an indictment. The ineligibility arises from the receipt, detention and failure to account for and pay over the money. It is not a permanent disability to hold office, but temporary, continuing so long as the public funds are unlawfully detained, and ceasing when paid over. The question was, did H. owe and detain unlawfully the money at the time he was appointed. If so, he was ineligible, not upon the conviction of the misdemeanor, and the proceeding in *quo warranto* is not to inquire into the misdemeanor, but into the rights of the respondent to continue in the office. *Ibid.*

## PARTIES.

### See CHANCERY PRACTICE. PRACTICE.

1. CHANCERY PRACTICE — NECESSARY PARTIES, ETC. — Where the administrator of the vendor is the complainant, asserting against the assignee of the vendee, the security held by him for the debt, the heirs of the vendor are necessary parties, so that their title may be divested. That must be so unless the administrator tenders a proper deed from the heirs. *Kimbrough v. Curtis*, 117
2. BILL TO CANCEL — FRAUDULENT CONVEYANCE. — The authorities are not agreed as to whether the liens of a fraudulent grantor are necessary parties to a bill to cancel a fraudulent conveyance. *Smith v. Grimm*, 26 Penn. St., 95. *Gaylord v. Kelshaw*, 1 Wallace, 81. Where an answer to a bill is made a cross bill, and asks for the cancellation of a deed, the complainants in the cross bill must confine it to the parties in the original bill. New parties cannot be introduced in the cross bill. *Ibid.*
3. SAME — CASE IN JUDGMENT. — M., having a decree against S., was proceeding to sell her land levied upon, when she was enjoined by M. S., who claimed the land by virtue of a conveyance to her from W., trustee, etc., made before the decree was rendered against S. Pending the injunction, S. died. Upon the final hearing, M. made her answer a cross bill, and in it prayed for the cancellation of the deed to M. S., as fraudulent. A decree was rendered accordingly. *Held*, that this decree was erroneous, as the proper parties were not before the court to warrant it in cancelling the deed; but the decree should have been, dissolving the injunction and allowing the land to be sold under the former decree. *Shaw v. Millsaps*, 380



## PARTNERSHIP.

1. **PARTNERSHIP AND INDIVIDUAL CREDITORS—RIGHTS THEREOF.**—The creditors of a partnership have a preference to the exclusion of the creditors of an individual member, the rights of the latter extending no further than to the surplus interest of the individual member after the joint liabilities have been satisfied. *Irby v. Graham*, 46 Miss., 425. *Bass v. Estell*, 300
2. **SAME—MARSHALING ASSETS—CASE IN JUDGMENT.**—B., the judgment creditor, having notice of the trust deed of E. & F. and E. & Son; *held*, that the conveyance confers a preference to the extent of \$5,000—the sum named in it—to all the property embraced in it, both joint and several. The cotton being the fund first appointed to pay the trust debt, that must first be exhausted, then other joint assets, and, lastly, the individual property of E. When the trust creditors have been satisfied out of the joint assets, the judgment creditor has the right to the proceeds of the individual property of E., and also to the surplus interest of E. in both firms. *Ibid.*
3. **PARTNERSHIP—GENERAL AND LIMITED—RESPECTIVE POWERS THEREOF.**—The principle applicable to general partnerships is, that all acts done by one partner in the course of the business is in legal effect as if done by all. Each partner is constituted an agent for all, as to all matters within the scope of the business. Restrictions imposed by partnership articles have no operation in transactions with strangers unless they have notice of them. In partnerships of a limited character the measure of authority imparted to an individual member to bind the firm in transactions with third persons is limited by the nature of the business. *Prince v. Crawford*, 344
4. **SAME—PLANTING PARTNERSHIPS—LIABILITY TO THIRD PARTIES.**—In planting partnerships there is not implied power in the several members to borrow money, draw bills of exchange, etc., and thereby bind the firm. Those who deal with individual members of such firms must at their peril inform themselves of the articles of association and the power communicated to each to bind all. *Story on Partn.*, § 216. The extent of the liability of such firm for the acts of its members depends upon the nature and scope of the business, and where one member exceeds the usual power of such partnerships the party dealing with the member must show that he had authority to bind the firm or that the members of the firm acquiesced in the act, before the firm would be bound thereby. *Ibid.*
5. **SAME—ERRONEOUS INSTRUCTIONS.**—The second charge for the plaintiffs was erroneous, because it might have misled the jury as to the liability

of the firm for the acts of one of its members. The third instruction for plaintiff was obnoxious, because it tended to mislead the jury in that they may have construed it as embracing the idea, that if one member of the firm was in the habit of drawing drafts in the purchase of supplies, in the firm name, that established the "usual practice of the firm." For the same reasons the modifications of the first and second charges for defendant are erroneous. The modification of defendant's third charge is objectionable, in that in order that silence or negligence may have the effect of binding the nonparticipating partner, it ought to be shown that he was so situated that he must have known it, or it should be inferred that he did know of the course of business, so that his conduct would mislead and deceive if he were permitted to plead nonacquiescence.

*Ibid.*

**PAYMENT.** See **APPROPRIATION OF CREDITS.**

**PLANTING PARTNERSHIP.** See **PARTNERSHIP.**

### PLEADING.

1. **CHANCERY PRACTICE—MULTIFARIOUSNESS.**—Where J., as guardian of certain minors, sold real estate on time, under an order of the probate court, and took notes for the purchase money, and F. becoming the purchaser; and afterwards, J. sold other real estate, as administrator, and F. became the purchaser again, and executed notes for the purchase money, J. filed his bill to enforce his lien on the notes payable to him, both as guardian and administrator: *held*, that the bill was bad, for multifariousness. *Jones v. Foster*, 47
2. **SAME.**—The bill cannot join several distinct, unconnected subjects against the same defendant, or against several defendants. *Ibid.*
3. **PRACTICE—PLEADINGS—NOTICE.**—Where an improper notice is attached to a plea of the general issue, the mode of avoiding the special matter proposed to be proved under it is, not by demurrer, but by an objection to the introduction of the testimony. *Wren v. Hoffman*, 41 Miss., 616. *N. O., J. & G. N. R. R. Co. v. Wallace*, 244
4. **SAME—PLEA OF PUIS DARREIN CONTINUANCE.**—The rule is well established, that whatever new matter has arisen in point of time, since the last continuance, which would defeat the plaintiff's action, must be taken advantage of by this plea. It serves to present some new fact not in existence at the date of the original pleading. *Irion et al. v. Hume*, 419
5. **CHANCERY COURT—DEMURRER—FRAUD.**—Where the complainant's bill charges a combination to cheat and defraud the complainant, and the defendant filed a general demurrer to the bill: *held*, that the demurrer to that part of the bill charging defendants with a combination to cheat

- and defraud was bad. That part of the bill required an answer, and the demurrer should have been overruled. *Shearer v. Shearer*, 113
6. SAME—SAME.—It is a general rule that a demurrer cannot be good as to a part which it covers, and bad as to the rest, and therefore it must stand or fall altogether, *Ibid.*
7. CHANCERY PRACTICE—AMENDMENTS TO BILLS.—The practice in this state, under the liberal rules of amendments of pleadings authorized by statutes, is to entrust to the courts of original jurisdiction a very large discretion over the pleadings. It is no abuse of that discretion to allow a defendant to withdraw an answer and put in a demurrer to the bill, especially if the bill does not state a title to the discovery and relief sought. *Kimbrough v. Curtis*, 117
8. PLEADINGS IN EJECTMENT—RULE AT COMMON LAW.—At the common law the defendant in an action of ejectment was permitted to make defense upon the terms, that he entered into the "consent rule" and pleaded the general issue. No other plea was admissible. *Bernard v. Elder*, 336
9. SAME—RULE UNDER THE STATUTE (CODE 1857, p. 386).—The statute in dispensing with the fictions of the common law, still confined the defendant to the plea of "not guilty" under which he might give "in evidence any lawful defense to the action," but if the defendant shall desire to dispute or deny his possession at the commencement of the action, he must do so by special plea, as the plea of the general issue has the effect of an admission that the defendant was in possession at the commencement of the action. *Ibid.*
10. PLEADINGS—DEFECTS THEREIN—WAIVER THEREOF.—A party going to trial without objecting to a defect in the pleadings cannot be heard to complain for the first time in the appellate court. Ample power is given by the statute to amend or correct any defect in the pleadings. *Phillips v. Cooper*, 723

POLICY OF INSURANCE. See INSURANCE.

POSSESSION OF STOLEN PROPERTY—PRESUMPTION ARISING FROM. See CRIMINAL LAW, 8-7.

## PRACTICE.

See STATUTE OF LIMITATIONS.

1. PLEA OF NON EST FACTUM.—Under the plea of *non est factum*, the issue is the genuineness of the signature of the defendant, and it is error to instruct the jury that it is incumbent upon the plaintiff to prove the plea and affidavit false. It was only incumbent on the plaintiff

to prove the signature of F. Carr to the note to be genuine. *Patrick, Guardian, v. Carr*, 199

2. OFFICE CONFESSION OF JUDGMENT—ITS EFFECT.—Under the statute (Code of 1857, p. 523), an office confession of judgment must be confirmed by the court before it becomes a judgment. When confirmed, the lien thereof does not relate back to the time of confession, but only to its confirmation. *Ibid.*
3. BOND OF INDEMNITY — DAMAGES — HOW RECOVERED.—Where a bond is executed by the plaintiff in execution to indemnify the sheriff against any damage that may accrue to the claimant, the remedy to recover damages sustained by reason of the levy, is on the bond of indemnity, and not in the claimant's issue. Where a levy is made upon personal property, which is claimed by another, who presents an issue to try the right of property, that issue does not involve the question of damages, nor does it preclude the plaintiff from a resort to the bond of indemnity to the sheriff for damages resulting from the unlawful levy upon the goods. *Shattuck v. Miller*, 386
4. SAME — SAME — SUIT ON THE BOND — PARTIES.—The bond of indemnity imputes to the obligors of the bond the entire responsibility which rested at the common law, upon the sheriff, for an illegal levy upon personal property, and is in substitution and bar of a suit against the sheriff, unless the obligors shall be or become insolvent, or the bond would be otherwise invalid, and suit may be brought and maintained against any one or more of the parties on any bond. The justice's court has jurisdiction to render judgment on the bond to the amount of \$150, though the bond may be for a larger sum. *Ibid.*
5. SET OFF—APPEAL FROM JUSTICE'S COURT.—T. brought his suit against M. in the justice's court, and obtained a judgment. M. took an appeal to the circuit court. In that court M. obtained leave of the court, and filed a set-off, for the first time, on the motion of counsel; the court refused to permit him to offer any proof in support of his set-off because no set-off was filed in the justice's court; *held*, that the circuit court ruled correctly. Rev. Code §§ 1305, 1306, 1334. *Marx v. Truesdell*, 498
6. SUIT ON BOND OF TAX COLLECTOR, JUDGMENT BY DEFAULT.—Suit may be maintained on the bond of a tax collector for money collected and not paid over; also for a failure to collect the taxes of his county. The Code of 1857, p. 521, provides that in actions of debt for a sum certain, and in actions founded on any instruments of writing, ascertaining the sum due or on an open account, \* \* \* if judgment be rendered by default, the clerk shall calculate the principal and interest and judgment shall be entered therefor. Under arts. 59, 60, 61, Code of 1857, these terms are used, "all taxes collected;" "the amount of taxes due the

state," and "amount due by the collector," deducting all legal allowances. The allowances to be deducted include insolvencies, delinquencies, lands forfeited, etc., and this indicates the scope of the trial to determine the amount for which a defaulting tax collector shall be held liable to the state. *Boykin v. State*, 376

7. **SAME—SAME—WRIT OF INQUIRY.**—Suit was brought on the bond of Boykin as tax collector of Wayne county, for failure to collect and pay over to the state treasurer, the sum of \$845.13, a part of the state taxes of 1869. Judgment by default was rendered against B. and his sureties on his official bond for the amount of the demand, and 80 per cent. damages: *held*, that the court should have awarded a writ of inquiry to ascertain the amount due to the state by the tax collector, after deducting all legal allowances. *Ibid.*

### PRINCIPAL AND AGENT.

**ADMISSIONS OF AN AGENT.**—The general rule is, that where the acts of an agent will bind the principal, admissions of the agent respecting the subject matter of the agency will also bind him, if made at the same time, and constituting a part of the *res gestæ*. Such admissions are regarded as verbal acts and part of the *res gestæ*, and may be proved without calling the agent himself. Declarations to be part of the *res gestæ* must be made during the negotiations or progress of the business of the agency, and be of such a nature as to give character to the acts done. *Dickman v. Williams*, 500

### PROCESS.

See "DUE PROCESS OF LAW."

**POWER OF THE LEGISLATURE OVER PROCESS.**—The provision of the bill of rights "that no person shall be deprived of life, liberty or property, except by due process of law," inhibits the legislature from dispensing with personal service, where it is practicable, and has been usual under the general law. It does not take from the legislature power to amend the law and change the formula of remedies; provided, the fundamental right of personal notice, actual or constructive, in personal suits, is not taken away. *Brown v. Leese Comm'rs*, 493

**PROOF OF LOSS.** See **INSURANCE.**

**PROVOCATION.** See **ASSAULT AND BATTERY.**

**PUBLIC MONIES.** *Persons liable for, unaccounted for.* See **OFFICE**, 15.

**PUBLIC IMPROVEMENTS.** See CONSTITUTIONAL LAW.

**PUIS DARREIN CONTINUANCE, PLEA OF.** See PLEADING, 4.

**PURCHASE FOR VALUE WITHOUT NOTICE.** See MORTGAGE, 3.

**PURCHASE BY TRUSTEE.** *When Void.* See TRUSTS.

## RAILROADS.

See CORPORATIONS.

1. **LIABILITY FOR DAMAGES TO EMPLOYEES.** — The rule of law, as established in England and most of the American states, is that a servant accepting employment for the performance of specific duties, takes upon himself the natural and ordinary perils incident to the service which are exposures from the negligence of fellow servants in the same common employments. *N. O., J. and G. N. R. R. Co. v. Hughes*, MSS. Opinion Book D, page 226. *Houd v. Miss. Cent. R. R. Co.*, 178
2. **SAME—LIABILITY TO EMPLOYEES FOR NEGLIGENCE OF FELLOW SERVANTS.** — The master is not liable for injuries which may happen to a servant in his employment, unless the master is culpable, that is, chargeable with negligence or carelessness, either in respect to the act that caused the injury, or in the employment of the person who caused it, or keeping him in service after notice of his unfitness, or after, with the use of proper diligence, he ought to have known it. In order to hold the company responsible to an employee (such as a conductor) for injuries sustained because of the road or its appurtenances being out of repair, it must be shown that the company is in default in its duty, either by the selection of incompetent servants or an insufficient number of them to do the work, or failure to furnish proper materials, or that the company had notice of the bad condition of the road, or is chargeable with negligence for not knowing. *Ibid.*
3. **LIABILITY FOR DAMAGES AS CARRIERS.** — T. went aboard the cars, paid fare to Boguichitto. The train did not stop, but ran past two miles to a water tank. T. demanded that the train should return. The conductor was courteous and polite, and submitted the option to T. to leave the train at the tank or ride to the next station and return to Boguichitto free of charge. T. accepted the latter alternative; *held*, that this was a compulsory choice. The train upon which he returned ran beyond the station and landed him about 150 yards beyond, and he voluntarily jumped off, without injury. On the trial, the counsel for defendants demurred to the testimony, and the court sustained the demurrer; *held*, that this was error. *Thompson v. N. O., J. & G. N. R. R. Co.*, 817
4. **SAME—CASE IN JUDGMENT.** — Although no bodily injury, mental sufferin g

insult, oppression, or pecuniary loss be shown, and though these concomitants of damages are disclaimed, yet if the railroad company failed in its obligation by neglecting to deliver its passenger at B., the passenger acquired a technical right of recovery, but the rule of punitive damages does not apply. Hence, although the damages are only nominal, nevertheless, the cause of action should be sustained. *Ibid.*

5. LIABILITY FOR INJURY TO STOCK. — If stock intrude upon a railroad track, the company has no claim for damages against the owner; and for the damages done by railroad trains to stock, the liability of the company depends upon whether the injury was caused by negligence or mismanagement. The party claiming damages must prove that due precaution to prevent the injury was not used by the company, or its employees. Injury to animals is not of itself evidence of negligence. It must be established by positive proof. *M. & O. R. R. Co. v. Hudson*, 573
6. SAME — SAME. — Where the testimony fails to explain the circumstances of the injury or killing, but the plaintiff trusts to the simple fact of the injury or killing from which to deduce the inference of negligence or misconduct of the company or its servants, he comes short of proving his case. *Ibid.*

REAL ESTATE. See BOND FOR TITLE.

REAL ESTATE OF DECEDENT; *When liable to be Sold*. See CHANCERY PRACTICE, 23-26.

## RECOGNIZANCE.

FORFEITURE — RELEASE. — S. was indicted for larceny, entered into recognizance with plaintiff in error as his surety on the bond, in May, 1872; forfeiture was taken and judgment rendered against principal and surety in 1873. The act of the legislature entitled "an act to amend the rules of practice and procedure in criminal cases in this state," was approved April 5, 1872, and took effect the 5th of June, 1872. Sec. 9, art. 12, const.: *held*, that the court erred in rendering judgment in this case. The plaintiff in error is entitled to the benefit of the act referred to, and should have been released. *Doniphan v. The State*, 54

REGISTRATION OF DEEDS. See DEEDS.

REGISTRATION OF VOTERS. See CONSTITUTIONAL LAW, 9.

REFERENCE. *To compute amount due*. See CHANCERY PRACTICE, 14.

RELEASE. See RECOGNIZANCE.

REMOVAL FROM OFFICE. See OFFICE, 5.

### REPEAL OF STATUTES.

1. **REPEAL OF STATUTES — EFFECT THEREOF.**— The effect of the repealing statute is to obliterate the repealed statute as completely as if it never had been passed. It must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded while it was an existing law. If there has been a change or repeal of the law applicable to the rights of the parties, after rendition of the original judgment and pending the appeal, the case must be heard and decided in the appellate court, according to the then existing law.  
*Musgrove, Aud'r, v. V. & N. R. R. Co.,* 67
2. **SAME — SAME.**— If the judgment of the court of original jurisdiction was wrong on the law as it then stood, although there may have been error, if the law has been repealed, the appellate court will not reverse and remand, because the inferior court must recognize the repeal and conform on the second trial to the law as it then was. *Ibid.*
3. **SAME — POWER OF THE LEGISLATURE.**— The legislature has plenary power to enact laws or repeal them, unless prohibited expressly or by implication by the state or federal constitution. The power to repeal a law is as complete and full as the power to enact it. The repeal of a statute terminates all proceedings under it, unless rights have accrued which cannot be divested. *Ibid.*
4. **VESTED RIGHTS — REMEDIES — POWER OF THE STATE OVER THEM.**— The general rule is, that the right to a particular remedy is not a vested right. The exception is of those special cases where the remedy is part of the right itself. Aside from this exception the state has complete control over remedies, provided, that in changing the remedy, it does not impair the preexisting right. *Ibid.*
5. **SAME — ACT OF APRIL 6, 1874.**— This statute which repealed the act of 1872, allowing the auditor to assess a tax, under certain circumstances, to pay a subscription, etc., put an end to proceedings against the auditor to compel the levy of the tax, but did not destroy or impair any vested right or the obligation of any contract to which the company may have been substituted. *Ibid.*
6. **ACT OF MARCH 15, 1872 — POWER OF AUDITOR THEREUNDER.**— This statute empowers the auditor to levy the tax when the authorities of the county neglect or refuse so to do, and such neglect or refusal is not on account of any sufficient cause or in consequence of pending and undecided litigation. It does not contemplate a legal controversy with the auditor to determine the validity of the indebtedness of the county, as no provision is made for giving notice to the county, the real party in



interest; nor is any mode devised for investigating disputed issues. It implies that litigation must be with the boards of supervisors, for it makes a pending litigation one of the good reasons why the board declined to act. If the liability of the county has been determined by a court of competent jurisdiction, or if the board of supervisors have no valid objection to the debt, but declines to tax merely to shield the county from its burden, then the auditor may have been required to make the assessment. *Ibid.*

7. CASE IN JUDGMENT. — The act of 1872, empowering the auditor to make the levy, having been repealed by act of 1874, pending this appeal, terminates all proceedings against the auditor. And the company having failed to show that the neglect or refusal of the board to assess the tax was willful and without good cause, a sufficient case, in the absence of the repeal of the law, is not made out to justify the auditor in making the assessment. *Ibid.*

8. AGRICULTURAL ACT OF FEB'Y, 1867. — Sec. 8 of the code of 1871, provides that "this code shall supersede and repeal all preexisting statutes of a general nature, the subjects of which are herein revised and consolidated. The act of Feb'y 17, 1873, for the encouragement of agriculture, introduced for the first time into our jurisprudence liens as defined in the 1st, 2d and 8d sections, so as to give a credit to those who produce agricultural products. The 4th and 5th sections give remedy by a special mode of suit. The 6th section, to make efficient the lien, exempts the growing crops from sale under execution. The subject matter of this statute is not revised or consolidated and is not repealed by § 8 of the code of 1871. *Cayce v. Stovall*, 396

REPLEVIN. See SHERIFF.

RESCISSION OF CONTRACT. See CHANCERY PRACTICE, 15.

REVIVOR OF JUDGMENT. See LIMITATION OF ACTIONS. SCIRE FACIAS.

RIGHT OF WAY. See EASEMENT.

SALE. See JUDICIAL SALE. SHERIFF'S SALE.

### SCHOOL FUNDS.

LOAN THEREOF—SECURITY, ETC.—A loan of the school fund upon mortgage or other security than that named in the statute, is a misapplication of the fund for which the trustees would have been personally liable. *Lindsay v. Marshall*, 12 S. & M., 590. But the statute does not make void a mortgage or other security for a loan of the school funds. *Littleworth v. Davis*, 403

SCHOOL TRUSTEES. See CORPORATIONS, 4.

## SCIRE FACIAS.

## See LIMITATION OF ACTIONS.

**REVIVOR OF JUDGMENT—STATUTE OF LIMITATIONS.**—Where R. P. recovered judgment against J. et al., on the 5th day of March, 1867. The plaintiff died, and J. D. P. became the administrator, and sued out a writ of *scire facias* to revive the judgment on the 5th day of August, 1874. *Held*, that the action was barred by the statute of limitations of seven years. Code of 1857, art. 8, page 400; Code of 1871, § 2153. No execution having issued on the judgment, had the plaintiff been living at the time of the issuance of the *scire facias*, he could not have revived the judgment. The administrator does not stand in a better attitude. *Palmer v. Jones*, 657

**SEPARATE MAINTENANCE.** See HUSBAND AND WIFE, 8-12.

## SET OFF.

**PRACTICE—SET OFF—APPEAL FROM JUSTICE'S COURT.**—T. Brought his suit against M. in the justice's court, and obtained a judgment. M. took an appeal to the circuit court. In that court M. obtained leave of the court, and filed a setoff, for the first time, on the motion of counsel; the court refused to permit him to offer any proof in support of his set-off, because no setoff was filed in the justice's court; *held*, that the circuit court ruled correctly. Rev. Code, §§ 1305, 1306, 1334. *Marx v. Truesdell*, 498

## SHERIFF.

## See TAXES. OFFICE AND OFFICERS.

**MOTION AGAINST A SHERIFF—BOND OF INDEMNITY—REPLEVIN.**—The effect of the law (Rev. Code of 1871, §§ 844 and 845) is to transfer to the obligors in the bond of indemnity the responsibility which, at common law, rested upon the sheriff for an illegal seizure of property not liable to the writ. In cases where, at common law, the owner of property so seized could recover damages against the sheriff, the suit upon the bond is substituted for that in the name of the obligee, and for his use. And this substitution is a bar to any action against the sheriff, unless the obligors on the bond shall be or become insolvent, or the levy be otherwise invalid. It is the duty of the sheriff, after taking the bond of indemnity, to proceed to sell the property, unless it be taken out of his hands by legal process. The claimant may litigate his right to the property in an action of replevin, and, if he fails, he is precluded from any

action against the sheriff. Where a motion is made against the sheriff for a failure to make the money on a *f. fa.*, and he answers that he levied on the only property liable to be taken, and that that had been taken out of his hands by paramount legal process, that will be a sufficient answer.

### SHERIFF'S SALE.

**TITLE THEREOF.** — A purchaser at a sheriff's sale, like every other assignment by act of the law, only transfers the interest of the debtor, whatever it may be, and the condition it is in, subject to all the equitable and legal demands of other persons. *Taylor v. Lowenstein*, 278

**SHIPMENT.** See STOPPAGE IN TRANSITU.

**SPECIFIC PERFORMANCE.** *Jurisdiction of court of equity to compel award.*  
See ARBITRATION AND AWARD.

**STATE BOARD OF EDUCATION.** See MANDAMUS.

**STATUTE OF LIMITATIONS.** See LIMITATION OF ACTIONS.

**STATUTE OF FRAUDS.** See CONVEYANCE, 1. FRAUD, 1, 8.

### STOPPAGE IN TRANSITU.

1. **SHIPMENT — STOPPAGE IN TRANSITU.** — B. shipped 8 bales of cotton to D. & H., of New Orleans, on account of Weisenger, by the steamer *Magenta*, to be sold by D. & H. on account of Weisinger. Whilst *in transitu*, the cotton was attached by W., and D. & H. made affidavit claiming the cotton, and presented an issue to try the rights of the respective parties. If goods are shipped by the order of the consignee and for his account, where the consignee sustains the relation of purchaser, the moment the goods are delivered to the carrier, they have passed from the seller and are the property of the vendee, as completely as if they had actually come to his possession, subject, however, to the right of stoppage *in transitu*, if the purchaser has become insolvent. But where the goods are shipped without order, and on account of the shipper, he stands towards the consignee as principal, and the consignee sustains the relation of agent or factor, and the shipper continues the owner and may generally order and direct the disposition of the goods, or even reclaim them. *Dickman v. Williams*, 500
2. **ATTACHMENT — STOPPAGE IN TRANSITU.** — What effect has the levy of an attachment upon the rights of the defendants in error, as vendors, to stop the goods *in transitu*? The right of stoppage *in transitu*,

though first introduced and founded in equity, has long been considered and acted upon as a legal remedy. The justice of the right is admitted and recognized in constant practice, as an extension of the lien which the vendor has for the recovery of possession of the goods, as a legal possessory remedy. *Morris v. Shryock*, 590

8. SAME — SAME — CASE IN JUDGMENT. — The attachment at the suit of M. against S. & Co., was levied on goods on the wharf boat, which had been purchased on credit by S. & Co. of Shryock & Rowland of St. Louis, who shipped the goods to S. & Co., but before S. & Co. obtained possession the attachment was levied, after which S. & R. set up their claim to the goods, under their right of stoppage *in transitu*. Under these circumstances, the actual shipment of the goods to the vendees by their order, constituted a good contract of sale, and a good constructive delivery so as to vest the property in the goods in the vendees, and place them at their risk, yet it was subject to the right of the vendors to stop the goods *in transitu*, in case the vendees became insolvent, this right may be exercised at any time before the goods come into the actual possession of the vendees. *Ibid.*

SUBMISSION. See ARBITRATION AND AWARD.

SUBSCRIPTIONS. *By Municipal Corporations in Aid of Railroads*. See CONSTITUTIONAL LAW, 1, 2.

### SUPERINTENDENT OF EDUCATION.

1. TERM OF OFFICE. — The constitution, art. 8, sec. 5, limits the terms of office of county superintendents to two years, and makes no provisions for their holding over until their successors are appointed and qualified. It was, therefore, *ultra vires* of the legislature to increase or extend their term of office beyond the constitutional limitation. *Burnham v. Sumner*, 517
2. SAME — QUALIFICATION — ACT OF APRIL 17, 1873. — Sec. 27 of the act of April 17, 1873, requiring an applicant, before he can be appointed county superintendent of education, to submit with his application a certificate from the board of examiners, setting forth his educational qualifications, habits and moral character, and executive ability, is constitutional, and an appointment made by the state board of education without such certificates is invalid. *Ibid.*

SURETIES. *Judgment against*. See ATTACHMENT, 5, 6.

SURRENDER. See OFFICE, 2.

### SWAMP AND OVERFLOWED LANDS.

1. **TITLE THERETO — ACT OF CONGRESS, 28th SEPTEMBER, 1850.**—This act of congress, which made a grant of all swamp and overflowed land within the state to the state, vested at once the title to all such lands in the state. The vesting of the title in the state is not dependent upon a designation of the lands by the secretary of the interior. If the state or its vendee can show that certain lands were swamp and overflowed lands, that establishes the title under the grant. *Fore v. Williams*, 35 Miss., 536; *Rail-road Co. v. Smith*, 9 Wall., 99. *Daniel v. Purvis*. 261
2. **SAME — CASE IN JUDGMENT.**—It is admitted that the tract in controversy is swamp and overflowed lands, and in the list of swamp lands located by the state and filed in the office of the secretary of state on the 6th of Dec., 1856, and submitted to the secretary of the interior 11th of Nov., 1856, and approved 13th of Nov., 1856. That the entry of Purvis, through whom the plaintiff in ejectment claims, was made the 7th of March, 1856. *Held*, that the title of the United States passed to the state by the act of congress of Sept. 20th, 1850, and that no interest remained in the United States to vest in P., the enterer and patentee. That the approval of the plat did not vest the title, but merely designated the land. *Ibid*.

### TAXES.

**COLLECTION THEREOF — SHERIFFS.**—The Code of 1857, p. 71, provides that sheriffs shall be ex-officio tax collectors of their counties. This provision is not embraced in the Code of 1871, though frequent mention is made of tax collectors, their duties, fees, etc., in the code *Quare*. Is this provision of the Code of 1857 repealed by § 8 of the Code of 1871? If so, then sheriffs are tax collectors by virtue of their elections as sheriffs, for the collection of taxes was incident to and part and parcel of the duties of sheriffs when the constitution was ratified in 1869. *Byrne v. State*. 688

**TAXATION. ITS OBJECTS.** See CONSTITUTIONAL LAW.

**TENANCY.** See LANDLORD AND TENANT.

**TENANT.** See LANDLORD AND TENANT.

**TERMS OF OFFICE.** See SUPERINTENDENT OF EDUCATION.

### TRUSTS.

**PURCHASE BY TRUSTEE — WHEN VOID.**—A trustee may deal with a *cestui que trust*, and may purchase his share in the fund. The *cestui que trust*

may avoid the sale or he may by acquiescence confirm it. It is for him to say whether it shall stand or not. *Jackson v. Van Dalsen*, 5 Johns., 46. *Tatum, Adm'r, v. McLellan*, 2

VACANCY. See OFFICE.

VENIRE. See JURY, 4.

VENUE, CHANGE OF. See CRIMINAL LAW, 19.

## VENDOR'S LIEN.

See VENDOR AND VENDEE.

1. CHANCERY COURT.— H. sold to E. a tract of land in Hinds county, for \$21,079.60, by installments, for which E. executed his several promissory notes. H. executed a deed; the notes were described in the deed, and expressly made a lien on the land. The deed was properly acknowledged and recorded. Afterwards E. became indebted to H. in the further sum of \$928.75, for a different consideration, and not secured by lien. Upon this latter note H. sued, obtained judgment, had the land sold, and D. became the purchaser. H. filed his bill on the notes against E. and D., to enforce the vendor's lien, and to subject the land to sale therefor. *Held*, that neither judgment creditors nor purchasers at sheriff's sale, deriving rights by operation of law, are to be regarded as purchasers for a valuable consideration, but mere volunteers in contemplation of a court of equity. *Davis v. Hamilton, Adm'r*, 213
2. SAME — SAME — EXPRESS LIEN — EQUITY OF REDEMPTION.— Where a lien on land conveyed is expressly reserved in the deed, which was duly recorded, it creates a clear equitable mortgage, of which every one is bound to take notice, and the purchaser of such land at sheriff's sale, will take nothing more than an equity of redemption, and take the land subject to the lien for the unpaid purchase money. In this state the equity of redemption in property mortgaged or conveyed by deed of trust is not subject to sale under an execution at law, emanating from a judgment rendered for the debt secured by the mortgage or deed of trust. *Carpenter v. Bowen*, 42 Miss., 52. The equity of redemption is the excess of the value of the property conveyed over and above the debt secured by the mortgage, and the purchaser thereof stands in the shoes of the debtor, and takes the property subject to the incumbrance, which must be paid off and discharged in order to perfect the title to the same. *Ibid.*
3. SAME — SAME.— Where a purchaser at execution sale suffers the land to be sold under a decree of foreclosure, he will only be entitled to what remains of the proceeds of the sale after the payment of the debt secured, and if there is no excess, he gets nothing; the maxim of  *caveat emptor*  applies. *Ibid.*

## VENDOR AND VENDEE.

See VENDOR'S LIEN.

CHANCERY PRACTICE.—S. sold a tract of land to G., reserving the vendor's lien in the deed and in the notes. The deed was duly recorded. G. sold a part of the land to W. G. and W. are made parties to the bill. W. did not defend, and *pro confesso* was taken as to him. The lien and the equity are conceded. There was no interlocutory order confirming the master's report; *held*, that the report of the master in chancery was confirmed in terms by the final decree, and that this action of the court was not error. Where the attention of the chancellor is not called to the points in the case, they cannot in any case be considered in this court. *Griswold v. Simmons*, 137

. VESTED RIGHTS. See HUSBAND AND WIFE, 11. REPEAL OF STATUTES, 4.

VOLUNTARY CONVEYANCE. See FRAUDULENT CONVEYANCE, 5.

## VERDICT.

1. "PUT IN FORM."—Where the verdict of the jury is "put in form" in the presence of the jury, as to the calculation of interest only, and no complaint is made of errors in the calculation, or in the amount of the judgment, *held*, that this is not error, though this court is unwilling to create precedents of this character. It was an informality, but perhaps not an irregularity, but tends to irregularities and errors, if not to abuses. *Patrick, G'd'n, v. Carr*, 199

2. CRIMINAL LAW—UNNECESSARY DESCRIPTIVE WORDS IN A VERDICT WILL NOT VITIATE IT—CASE IN JUDGMENT.—The accused was indicted for an assault with intent to kill and murder, the jury found the accused not guilty as charged in the indictment, but guilty of "assault in an attempt to commit manslaughter": *held*, that the verdict is good as a finding as to the "assault," leaving off, as surplusage, the descriptive words "in an attempt to commit manslaughter," hence the finding, under the law, was for a misdemeanor only, and accused should have been so punished. *Bedell v. State*, 493

WAIVER. See INSURANCE.

## WARRANTY.

1. COVENANTS OF WARRANTY—BREACH THEREOF.—The authorities are not agreed as to the extent of the general covenant of warranty, and what will constitute a breach thereof. It is generally conceded, that if the vendee is sued in ejectment, or a demand of the premises is made by the

- owner of the better title, he may surrender the land and resort to his covenant. *Loomis v. Bedell*, 11 N. H., 74. *Kirkpatrick v. Miller*, 521
2. **SAME — SAME — EVICTION.** — An eviction under legal process is not necessary to give the covenantee a remedy on the warranty. It is not necessary for him to defend against a title which he is satisfied must eventually prevail. *Hamilton v. Cutts*, 4 Mass., 349. If his title was invalid he might abandon the possession. *Ibid.*
3. **SAME — CONSTRUCTIVE EVICTION — GENERAL RULE.** — The great weight of American authority is, that if the covenantee has been obliged to purchase a paramount title, which was being asserted against him, and under which he must ultimately be evicted, this amounts to a constructive eviction, and he may sue upon the covenant. *Estabrook v. Smith*, 6 Gray, 572. *Ibid.*
4. **SAME — RULE IN THIS STATE.** — In this state the covenant is given a more restricted operation and the cases confined within narrower limits the doctrine of technical eviction. The rule established by the cases is, that in order to recover upon the covenant, there must be an eviction or there must, at the time of the sale, have been an adverse possession under paramount title, holding the vendee out. *Burrus v. Wilkinson*, 31 Miss., 537; *Witty v. Hightower*, 12 S. & M., 481; *Dennis v. Heath*, 11 S. & M., 218. *Ibid.*
5. **SAME — RULE IN EQUITY.** — Whilst a court of equity holds the vendee to entire good faith to his vendor, and will not permit him to buy in an outstanding title or incumbrance and set it up in opposition to his vendor, yet it will lend its aid to reimburse all reasonable advances expended to fortify the title. At the same time it will rebuke every attempt by the purchaser to invalidate the title. *Champlin v. Dotson*, 13 S. & M., 553. *Ibid.*
6. **SAME — RULE AT LAW — ASSUMPSIT.** — Assumpsit being in its nature an equitable remedy, applicable to those circumstances where the defendant ought in equity and good conscience to pay money, but which is not recoverable in debt or covenant, will lie against the covenantor to recover the money paid by a vendee, to buy in an outstanding paramount title or lien. An actual eviction is not necessary before assumpsit will lie. A constructive or equitable eviction is sufficient. *Ibid.*

## WILLS.

1. **WILLS — FEE SIMPLE — WHAT WORDS NECESSARY TO CONSTITUTE.** — No technical words are necessary to devise a fee, but any words denoting an intention to pass the entire interest will suffice. 4 Kent's Com., 536. The court looks to the whole instrument to discover the intent, and although



technical words may be used, their legal operation may be countervailed if necessary to give effect to the clear intent. *Lasher v. Lasher*, 13 Barb., 106. *Tatum v. McLellan*, 2

2. SAME — ESTATE FOR LIFE WHEN CREATED. — The general rule is, that a devise for life with power to dispose of the thing at death is but an estate for life, and it goes, if the devisee or legatee does not dispose of it, to the next of kin of the testator. But if given to one generally, with a general power to dispose of it at his death, then he takes it absolutely. *Jackson v. Robins*, 16 Johns., 537; *Rail et al. v. Dotson et al.*, 14 Smed. & Mar., 176; *Dean v. Nunnally*, 36 Miss., 358. *Ibid.*
3. DEVISES FOR CHARITABLE PURPOSES. — Such devises are void under arts. 55 and 56, code of 1837, p. 302, and the heirs of the testator would take whatever was designed for the charity. *Ibid.*
4. CONSTRUCTION THEREOF. — Courts will look at the circumstances which surrounded the testator, and will, through these means, put themselves in his place, and then apply the terms of the instrument to its subject matter and objects. 2 Jarm. on Wills., p. 741. All parts of a will are to be construed in relation to each other, so as to form, if possible, a consistent whole. 16 Vesey, 314. *Watson v. Blackwood*, 15
5. SAME — SAME. — Although there may be apparent inconsistency in several parts of a will, yet if there be clearly discerned a general intent, that should prevail and overrule the particular — although the latter be first expressed. The governing intent ought to control in the construction, if it can be made compatible with the import of the language used. *Chase v. Lockerman*, 11 Gill. & John., 206. *Ibid.*
6. SAME — CASE IN JUDGMENT. — The testator in his will directed that his son by a former marriage, who was not living with the family and received no benefit from the estate during the life of the widow — to whom all the property was loaned for life — should have a certain slave at a fixed price, and to share equally in the estate. *Held*, that the liens of such son should not be charged with the value of the slave before participating in the distribution of the estate. *Ibid.*

WITNESS. See EVIDENCE, 7.

## WRIT OF ASSISTANCE.

See CHANCERY PRACTICE.

1. CHANCERY COURT. — The decree to sell lands directed the commissioner "put the purchaser in possession; if necessary that the writ of assistance be awarded." It is no longer a mooted question, that when equity has jurisdiction of a cause, it will retain it for all the legitimate purposes of the proceedings. It will retain jurisdiction in order to administer full

relief. 10 S. & M., 184; 84 Miss., 655; 27 lb., 419; 18 S. & M., 181; 33 Miss., 153. And this includes, in proper cases, the delivery of possession of real estate. Rev. Code, 1871, § 1267: 13 S. & M., 132. The writ of assistance is a process "well known to the law." 2 Daniels Ch. Pr., 1082; 1 Barb. Ch. Pr., 441. *Griswold v. Simmons*, 128

3. **SAME — WHEN THE WRIT OF ASSISTANCE SHALL ISSUE.** — The writ of assistance should issue upon the complainant filing with the clerk a petition, and proof of service of the order of the chancellor upon the defendant, and demand of possession, and his refusal to surrender. *Ibid.*

3. **CHANCERY PRACTICE.** — The object of the writ of assistance, to to put a party who has purchased real estate at judicial sales, into possession of the premises. The most familiar instance of its use is where land has been sold under a decree foreclosing a mortgage, but applies it to any other sale enforcing a lien, whereby the title and right of the property would pass to a purchaser, and where the party in possession was a party to the suit, or came into possession under him *pendente lite*. Where a court of equity has authority to dispose of the fee, as to all parties to the decree, it ought also to control the possession, in order to administer complete and efficient relief. The power of the court would be inadequate to full redress, if the suitor, after procuring a decree of sale, and investing the purchaser with title, must resort to a court of law, to obtain the possession. *Jones v. Hooper*, 510

4. **SAME — SAME — PETITION FOR WRIT.** — To entitle a party to the writ of assistance, the petition should show, the sale under the decree, the purchase, the deed by the commissioner, payment of the money, if the sale was made for cash. That the deed was exhibited to the defendant, and possession demanded. The defendant should have reasonable notice of the application for the writ. *Ibid.*

**WRIT OF INQUIRY.** See PRACTICE, 7.

2. 11. 11

7







